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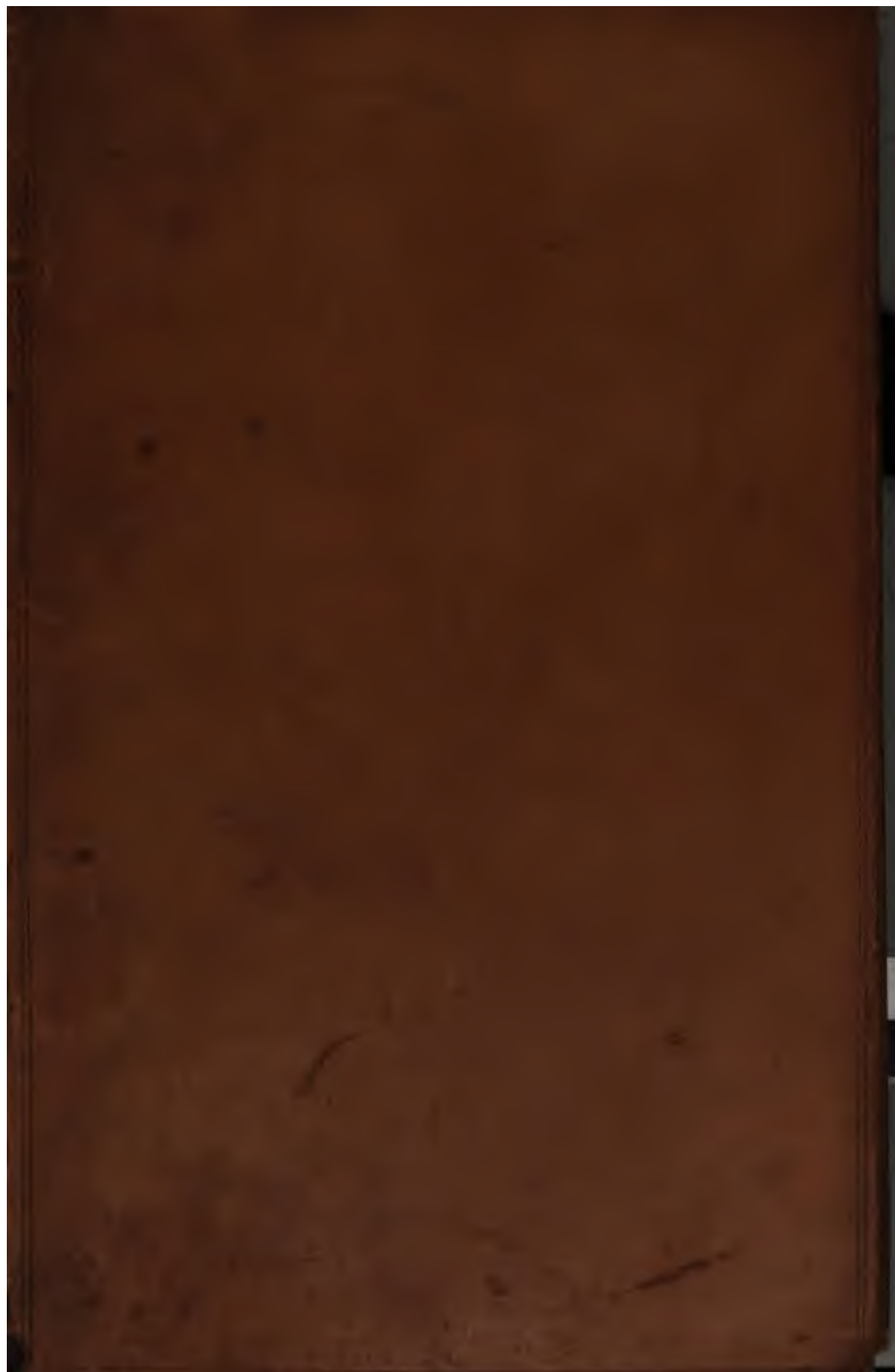
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REPORTS OF CASES
UPON
APPEALS AND WRITS OF ERROR

IN THE
House of Lords,
DURING THE FIFTH SESSION OF THE FIFTH PARLIAMENT
OF THE UNITED KINGDOM,

57 GEO. III. 1817.

BY P. DOW, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. V.

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1818.



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Chief Judges of the Courts of original Jurisdiction, from which Appeals and Writs of Error lay directly to the House of Lords during the Period of these Reports.

ENGLAND.

LORD ELDON, *Lord Chancellor.*

LORD ELLENBOROUGH, *Lord Chief Justice of the Court of King's Bench.*

RT. HON. SIR R. RICHARDS, KNT., *Lord Chief Baron of the Court of Exchequer.*

SCOTLAND.

RT. HON. CHARLES HOPE, *Lord President of the Court of Session, President of the First Division.*

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RT. HON. ROBERT DUNDAS, *Lord Chief Baron of the Court of Exchequer.*

IRELAND.

LORD MANNERS, *Lord Chancellor.*

RT. HON. W. DOWNES, *Lord Chief Justice of the Court of King's Bench.*

RT. HON. STANDISH O'GRADY, *Lord Chief Baron of the Court of Exchequer.*

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REPORTS
OF
APPEAL CASES
IN THE
HOUSE OF LORDS,
During the Session, 1816—17.

57 GEO. III.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BARRETT—Appellant.

BURKE—Respondent.

LEASE in 1718 for three lives, renewable for ever on payment of a fine on the dropping of each life, at 50*l.* rent, by *A.* to *B.* *B.* leases the lands to *C.* at 100*l.* rent, with covenant to renew for ever to *C.* on the same terms; and *B.* also covenants to renew regularly with *A.* *C.* pays his fines and renews with *B.*, but *B.* never renews with *A.* a representative of *A.*, in 1793, accepts some money from *C.* towards the discharge of the fines due from *B.*, and makes demands for payment of the whole of the fines by *C.*, which *C.* neglects to comply with. A formal demand of the fines made by a representative of *A.* in 1799, against *C.*, who does nothing for nine months after demand, and then makes an illusory tender which is not accepted. Held, by the House of Lords, that under these circumstances *C.* had no claim in equity to a renewal.

Feb. 26,
March 5,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANCY ACT.
&c.

Feb. 26,
March 5,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Per Lord Redesdale. A *formal* demand is not necessary under the Tenantry Act. The true meaning of the Tenantry Act is ~~to declare what was the Equity of Ire-~~ land, with respect to these leases, before the statute. When a demand is made, the neglect to pay, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect and becomes wilful. What is a reasonable time for payment must depend on circumstances, and no precise time applicable to all cases can, with justice, be fixed. Though a formal demand is not necessary, yet, when such a demand is made, the prior demands are ~~waived~~, and the time is to be computed from the period of the formal demand: but prior demands are to be taken into account in considering what is a reasonable time after the formal demand. When the first lessee receives the fines from his under-tenant, and neglects to pay them to the head landlord, that is fraud in the first lessee, who is therefore not entitled to a renewal, and the remedy of the under-tenant is against the first lessee, and not against the head landlord. The landlord, in making the demand, is not bound to state the precise sum due, nor to make a demand upon, or give notice to, every individual interested in the subject. The original design of these leases, ~~was the better cultivation of inferior lands~~ and the more easy recovery of the rent, &c.

Original lease,
Dec. 23.
1713.

BY indenture, dated 23d December 1713, the Honourable Edward Brabazon, being seized in fee of certain lands, those of Garrylish and others, in the county of Tipperary, demised the same to John Marshal, of Clonmell, for three lives (of the Brabazon family), at 50*l.* rent, with a covenant for perpetual renewal, upon the request, and at the expense, of the lessee, within twelve months after the expiration of any of the lives then inserted or thereafter to be inserted, upon payment of a fine of 25*l.* for each new life added. Robert Marshall, the son of John, having become entitled, he agreed to ex-

ecute a lease of the lands to one Terence Magrath, and then assigned his remaining interest to William Nash, whose nephew and representative, James Nash, afterwards specifically performed the agreement with Magrath, by executing a lease of the lands to Milo Burke, (the Respondent's ancestor) who had become entitled to the benefit of that agreement. The indenture, dated 9th Jan., 1761, after reciting the death of one of the *cestui que vies* in the original lease, and the nomination of a new life (that of Burke's son), witnessed, that in pursuance of the agreement, and in consideration of a 25*l.* fine then paid on the insertion of the new life, Nash demised the lands to Burke for three lives, with covenant for perpetual renewal, at a rent of 102*l.* 10*s.* Burke covenanted, within six months after the expiration of any of the lives, to name another life, and pay the fine; and Nash covenanted, in three months after a life so nominated and fine paid, to renew with the head landlord at Burke's expense. The indenture contained a proviso that, in case Burke neglected to nominate a life within the six months, Nash should be at liberty to nominate to the head landlord any life he might think proper: and Burke covenanted to pay interest to Nash on any of the fines that might be advanced by Nash to the original lessor before payment by Burke to Nash. The last of the *cestui que vies* in the original lease died in 1772, and, in point of fact, the lease never was renewed with the head landlord.

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March 5,
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LEASE FOR
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NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Nash becomes
entitled.

Lease from
Nash to
Burke.

The original
lease never re-
newed.

The Appellant became entitled to the lands as head landlord, in 1799, by devise from Edward

In 1799 Bar-
rett becomes
entitled as
head landlord.

Feb. 26,
March 6,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Formal de-
mand.

Demand in
March 1801,
and no step
taken by the
tenant to settle
the account
till Nov. 1801.

Brabazon ; and, having been unable to discover the representatives of Nash, he, by advice of counsel, calculated the renewal fines up to the 25th Feb., 1801, and executed a power of Attorney to one Dowling, authorizing him to demand and receive the fines. On the 27th Feb., 1801, Dowling, accompanied by the Appellant, went to the lands, and there a formal demand of the fines was made from the principal occupier, and also from the other occupying tenants ; and a notice of the demand was then also served by Dowling on the several tenants, including Milo Burke, the Respondent's father, who was then in possession ; and a copy of the calculation of the renewal fines was also served on Burke. The Appellant caused a notice of the demand to be published in the Dublin and London Gazettes, on the 5th March, 1801, which was continued for two months from that time. On the 24th March, 1801, Milo Burke furnished the Appellant with an account of money paid by him from 1774 to 1799 to the Brabazons, from which it appeared that Burke had paid considerably more than his own rent ; and he alleged that the excess was paid on account of renewal fines. Burke however took no step towards settling the account till the 27th Nov., 1801, on which day he made what was called a tender of the fines, taking credit for the sum alleged to have been paid by him to the Brabazons beyond his own rent. The tender consisted of eight notes of the Bank of Ireland, two notes of Messrs. Finlay and Co., and seven bills of exchange, accepted by several persons in trade in Dublin, some of which bills were then over due, and in the

hands of the holder, dishonoured. When Burke made this tender he was accompanied by his law agent, Mr. Edward Kirby, who had been agent for Mr. Edward Brabazon, the deviser of the Appellant. The Appellant took a memorandum of the particulars of each note and bill, and of the dates of the bills, and then returned the notes and bills, and asked Burke whether he had any more to say, and Burke answered that he had not.

Feb. 26,
March 5,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Tender.

In M. T. 1801, the Appellant brought an ejectment against Burke; and on the 4th Dec., 1801, Burke filed his bill in the Court of Exchequer, stating, that in 1780, William Brabazon, then the head landlord, had agreed to accept Nash's profit rent in discharge of the arrears of the head rent and renewal fines; and that from 1782 the head and profit rents had been regularly paid; and *that, in 1793, Edward Brabazon, the son of William, had distinctly agreed to accept of this mode of payment*, so that the forfeiture was waived; and praying that the Appellant, or the heir at law of Edward Brabazon, might be decreed to execute to Burke, as trustee for the heir or representative of Nash, a renewal of the original lease, and for an account and injunction. To this bill none of the Nashes were parties. The Appellant in his answer insisted that there had been such laches and neglect on the part of the Nashes, and those deriving under them, as amounted to gross fraud; and that the right of renewal was forfeited, particularly by the lapse of ten months from the time of demand and notice, without any attempt to pay the fines, except the illusory tender in November 1801.

Dec. 1801.
Bill by the
tenant for a
renewal.

Alleged
agreement in
1793.

Prayer for re-
newal to
Burke as trus-
tee for Nash.

Answer.

Feb. 26,
March 6,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

July, 1802.
Amended bill.

Burke then, in July 1802, filed an amended bill, making the representatives of Nash parties, in which it was stated, that by an agreement in writing, executed in 1782, Nash consented to assign his profit rent to William Brabazon until the arrears of the head rent should be discharged ;—a statement differing from that made in the original bill, inasmuch as it was not alleged in the amended bill that, in the agreement with William Brabazon, any thing was said respecting the renewal fines. The consent of Edward Brabazon in 1793 to accept the profit rent in discharge, both of arrears of head rent, and renewal fines, was stated as before ; and the prayer was the same as in the original bill. Answers having been put in, and the cause revived by the Respondent on the death of his father, issue was joined, and witnesses examined.

Evidence

The only evidence material to be noticed for the present purpose is that of the law agent for the Plaintiff, Mr. Edward Kirby, who had been the law agent of Edward Brabazon relative to the transaction of 1793. He stated, that in consequence of letters written by him, at the desire of Edward Brabazon, to Milo Burke, requiring Burke to settle an account of arrears of rent due from the Nashes, a meeting took place in May 1793, between Burke and Brabazon, at which he, Kirby, was present ; and it then appeared that all arrears of rent had been paid up to November 1792, with an over-payment of 100*l.* ; that Edward Brabazon said “ he “ would allow the over-payment out of the renewal “ fines due by the Nashes to him for the lands, “ whereupon deponent did then communicate to

“ said Burke that said Edward would expect immediate payment of all renewal fines due to him from the Nash family, and that renewals should be at once taken out, or words to that effect ; to which the said Milo replied, that his father had paid up all renewal fines due by said Bourke to the Nash family and obtained regular renewals of said premises, and that said Bourke had then a renewal executed by James Nash for three lives, all of whom he alleged were then living ; and saith, said Bourke did then produce to said Edward and to deponent a deed or instrument engrossed on paper purporting to be a renewal of said lands executed by said Nash, wherein said Milo Bourke, William Bourke, and John Bourke, said Milo’s father and brother, as deponent believes, appeared to be the lives named therein ; and believes the said William and John were then and still are living. Saith, on the production of said deed or renewal, said Edward expressed much displeasure that the Nash family should receive the renewal fines from said Bourke their under-tenant, and execute renewals without paying his, said Edward’s, family or himself their renewal fines, though the renewal fines payable by Bourke, on the fall of each life, to said Nashes, was same as was payable by the Nashes under their lease. Saith, said Bourke, under apparent distress of mind, informed said Edward, that he had a family of eight or ten children, and that he would be ruined if the said Edward would seek to enforce from him payment of the renewal fines, then appearing due to him ; upon which, said

Feb. 26,
 March 8,
 1817.

LEASE FOR
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 EVER.—NEG-
 LECT TO RE-
 NEW.—TEN-
 ANTRY ACT,
 &c.

Feb. 26,
March 5,
1817.

LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

“ Edward, with strong expressions of feeling and
 “ kind disposition towards said Bourke, declared he
 “ would not take advantage of him, and that for
 “ the present he would not proceed for payment of
 “ said fines ; *whereupon deponent, or said Edward,*
 “ *desired said Bourke should, as soon as he could,*
 “ *endeavour to make up the amount of the renewal*
 “ *fines, for that he, Mr. Brabazon, would not pay*
 “ *any compliment to the Nash family.* And that
 “ deponent did then ask said Edward, whether, as
 “ all arrears of rent were then paid up, deponent
 “ should continue to receive from said Bourke, the
 “ profit rent of 52*l.* 10*s.* a year, arising out of said
 “ lands, to said Nashes, which said Edward desired
 “ deponent to do, saying, he would allow such
 “ payments out of the renewal fines.” And then,
 after adverting to some matters of account, he pro-
 ceeded thus : “ Saith, that prior to May 1793, de-
 “ ponent believes he got instructions from said Ed-
 “ ward Brabazon to demand or enforce renewal fines
 “ from the Nash family ; in consequence whereof,
 “ deponent did, as he verily believes, apply to Milo
 “ Bourke, deceased, and also to Mary Nash, the
 “ widow of James Nash, for payment thereof.
 “ Saith, that from 1st May, 1793, till within a
 “ month of said Edward’s death, as deponent best
 “ recollects, said Edward never did, to this depo-
 “ nent’s knowledge, direct deponent to take pro-
 “ ceedings to evict the interest in the lands in the
 “ pleadings mentioned, in case said renewal fines
 “ were not paid ; but saith, that in the latter end
 “ of November, or beginning of December 1799,
 “ said Edward in conversation told deponent that he

“ wanted a new coach ; in answer to which, depo-
 “ nent told him he could easily get one ; to which
 “ said Edward replied, that he would not go in debt
 “ for a coach, but that he would insist on Bourke’s
 “ paying as much on account of the renewal fines
 “ as would purchase one, otherwise, that he would
 “ insist on payment of the entire, or evict the lease,
 “ or words to that effect. And saith, deponent did,
 “ immediately after such conversation, write to the
 “ said Milo Bourke, unless he did then, without
 “ delay, remit 200 guineas, as he best recollects
 “ and believes, on account of the fines due for said
 “ lands, to deponent, deponent would discontinue
 “ to receive the Nash’s profit rent ; but saith, said
 “ Bourke did not remit one shilling more than his
 “ usual payments of the head rent and some part of
 “ Nash’s profit rent.” And, in his cross examina-
 tion, the witness made the following statement with
 respect to the renewal fines : “ Saith, that prior to
 “ the month of May 1793, deponent was directed
 “ by Edward Brabazon, deceased, either to apply
 “ for or enforce the payment of the renewal fines
 “ and arrears of rent, if any arrears were due, on
 “ the lands in the pleadings mentioned, from the
 “ Nash family and said Milo ; saith, he recollects
 “ to have received such instructions subsequent to
 “ 1st November, 1799, but does not recollect to
 “ have received any such instructions in the interval
 “ between May, 1793, and November, 1799 ; does
 “ not recollect that any person was present when
 “ he received such instructions or directions ; be-
 “ lieves he answered on both such occasions that he
 “ would do as he was so directed ; saith that it was

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LEASE FOR
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“in consequence of deponent's application to Milo
“Bourke according to the first directions he re-
“ceived from Edward Brabazon on the subject,
“that a meeting took place on the 1st of May,
“1793, between said Edward and Milo at Tara,
“where an account was stated of the payments
“made by said Milo on account of the rents of the
“lands in the pleadings mentioned; saith deponent
“hath no recollection, nor does he believe *that said*
“*Edward, on any occasion, complained to deponent,*
“*or in his presence, that no proceedings had been*
“*taken for the recovery of the said rents or fines,*
“or made any complaint of that or a similar nature
“to deponent's knowledge or belief.”

Amount of the
evidence res-
pecting the al-
leged agree-
ment of 1793.

The amount of this evidence, as understood in the House of Lords, was that Edward Brabazon had accepted some money, part of the profit rent, on account of the renewal fines, but that he had not agreed that the whole should be gradually liquidated by payment to him of the profit rent, and that he had on the contrary insisted upon payment of the fines in a different mode, but without effect. The Court below, however, seems to have been of opinion that if Edward Brabazon accepted from Bourke any part of the profit rent on account of the fines, he thereby bound himself to accept the whole in that mode of payment, and had waived the forfeiture; and that the cause hinged upon the point whether Edward Brabazon had or had not thus accepted money from Bourke; and the Court tendered an issue to the defendant (Appellant, Barrett) to try that question, which issue Barrett declined to accept; and the Court seems therefore to have de-

Issue.

cided as if the question had been tried, and the verdict had been against him. The decree was as follows: "That the Appellant having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time, and when, receive any and what sums of money out of the lands comprised in the lease of 25d Dec., 1719, for or on account of the renewal or septennial fines due under said lease; that it appears to the Court, that William Brabazon, in the pleadings mentioned, and the said Edward Brabazon, were respectively in receipt of the rent of 102*l.* 10*s.* a year, in pleadings mentioned, from the 10th day of Dec., 1782, to the 30th Dec. 1799, first in discharge of the rent and arrears of rent due to them, and next in and towards satisfaction of the renewal and septennial fines, and the interest thereon; therefore let the officer inquire and report the amount of all sums so received by the said William and Edward Brabazon out of the said lands during the period aforesaid, and let him apply the same as received, first in discharge of rent and receiver's fees, and arrears of rent due, and then in discharge of the renewal and septennial fines and interest thereon; and let him strike a balance on the foot of such fines, septennial fines, and interest, on 27th February, 1801; and in taking such accounts of fines, and septennial fines, and interest, (the parties admitting that Brabazon Ponsonby, Earl of Besborough, died on the 15th July, 1758, and that Chaworth Brabazon, Earl of Meath, died 14th May, 1763, and that Edward Brabazon, Earl of

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Decree, May
16, 1807.

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LECT TO RE-
NEW.—TE-
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&c.

“ Meath; died 22d Nov., 1772; and it appearing
“ that the said tenant has twelve months time to
“ nominate a new life in the place and stead of any
“ life named in said lease of the 23d Dec., 1713,
“ that should happen to fall, and so from time to
“ time upon all subsequent renewals), let the officer
“ charge one fine of 25*l.* with interest from the
“ 15th July, 1759, and another fine of 25*l.* with in-
“ terest from the 14th May, 1764, and another fine
“ of 25*l.* with interest from the 22d Nov., 1773;
“ and so, at the end of every eight years from the
“ then periods last-mentioned, let him charge ad-
“ ditional fines of 25*l.* each with interest; and let
“ the officer distinguish and report how much of
“ the balance which will appear to be due for re-
“ newalandseptennialfines,andinterestthereon,upon
“ the said 27th day of Feb., 1801, according to the
“ directions aforesaid, is composed of renewal and
“ septennial fines which became payable to the said
“ Earl of Meath, the lessor during his life-time,
“ with interest for the same, and how much thereof
“ is composed of renewal and septennial fines which
“ became due in the time of William Brabazon
“ during his life-time, with interest for the same,
“ and how much thereof is composed of fines which
“ became payable to the said Edward Brabazon
“ during his life-time, with interest for the same,
“ and how much thereof is composed of fines due
“ to the Defendant, Roger Barrett (the Appellant),
“ in his own right, as the devisee of the said Ed-
“ ward, and reserve all equity between the parties,
“ and all further directions until the return of the
“ report.”

The officer having made his report, a final decree was pronounced on the 24th June, 1812, whereby the Appellant was ordered to execute a renewal of the lease to Mary Nash, widow, and Richard Harold, the surviving trustee named in the will of James Nash deceased, &c. From these decrees Barrett appealed.

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Sir Samuel Romilly and *Mr. Roupell* for the Appellant; *Mr. Hart* and *Mr. Wetherell* for the Respondent.

Final decree.
Renewal to
the Nashes.
Appeal.

Lord Eldon (C.) In this case the Court of Exchequer pronounced a decree reciting "That Barrett having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time and when receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due under the said lease, &c.;" and, afterwards, a decree was pronounced, giving Bourke the benefit of the act usually called the Tenantry Act. The Court below, therefore, proceeded on this issue as an essential part of the case; and they seem to have thought that, as the Appellant had declined to accept it, the case was to be taken as if the issue had been tried and found against him; and on that ground they gave relief. On looking at the bill and the answer, and at the evidence of Kirby; and considering with whom he was connected at the time of the latter part of these proceedings, and with whom he had been before connected; and consi-

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Judgment.

Ground of decision below, that Barrett had declined to accept an issue to try whether Edward Brabazon had received any payments on account of renewal fines.

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LEASE FOR
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NEWABLE FOR
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LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

That issue
ought not to
be directed,
and, though it
had been
found against
the Appellant,
it would not
have been con-
clusive against
him.

This not a
case of mere
neglect.

Demand
made, and not
complied
with.

dering the evidence altogether, and the whole circumstances of the case, I am of opinion that no such issue ought to have been directed; and, if I rightly understand the Tenantry Act, though that issue had been tried and found against the Appellant, it would not have been conclusive against him.

Looking at the Tenantry Act only, I cannot, in that view of the case consider this as a case of mere neglect; and it would be mischievous not to distinguish between cases of mere neglect, and cases of wilful neglect. The tenant was in possession, and knew the *cestui que vies*; and he transacts with his intermediate landlord, paying him the fines, while no care was taken to pay what was due to the original lessor. In this case also a demand was made, and not acceded to; and it cannot be considered as a case of mere neglect.

I have stated the grounds of my opinion very shortly, because the reasons and principles on which it is founded will probably be stated and explained at large, and much better, by a noble Lord who presided for some time in the Court of Chancery in Ireland.

Lord Redesdale. I am clearly of opinion that the decrees ought to be reversed. The issue had no tendency to decide the case. The issue was, "whether Edward Brabazon, in the pleadings mentioned, did, at any time and when, receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1718, for or on account of the renewal or septennial fines due

"under the said lease." That was a question which would not decide the case; for, though some sums had been paid to Edward Brabazon on account of the fines, that would not decide whether there was such neglect on the part of the tenant, as ought to deprive him of the benefit of renewal. The issue has not been proposed according to the case contended for on the part of the Respondent; that is, a case of *contract*, and that, such being the *agreement* entered into between him and Brabazon, the representatives of Brabazon were bound to renew according to that agreement. That has been contended on the part of the Respondent. The issue, however, is not of that description, but one which has no tendency to decide the case.

But it is clear from Kirby's evidence that there was no such agreement. The evidence amounted only to this, that Edward Brabazon consented to apply what he received beyond the arrears of the head rent towards the discharge of what was due to him on account of the fines. But there was no contract that he would not call for the fines in any other manner; and it appears, from Kirby's evidence, that he did, in fact, call for the fines in another manner: so that the ground on which the Court of Exchequer proceeded is not a just ground. The only question is, whether the tenant, having clearly lost his legal right, ought to have the relief which, by the practice of the Courts of Equity in Ireland, was given, before the Tenantry Act was passed; for the true meaning of the Tenantry Act is to declare what was the Equity of Ireland before the statute. It is merely a declaratory act. The act itself recites

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LEASE FOR
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LECT TO RE-
NEW.—TE-
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&c.

The issue not
decisive of the
case, for
though some
sums might
have been paid
to E. Bra-
bazon on ac-
count of the
fines, there
might still
have been wil-
ful neglect on
the part of the
tenant.

The real na-
ture and effect
of the transac-
tion of 1793.

The Tenantry
Act. It is a de-
claratory act,
declaring
what was the
Equity of

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LEASES FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Ireland before
it passed.
Demand. Ne-
glect. Rea-
sonable time.

Truman v.
Waterford,
1 Scho. Lef.
454.

No precise
time for re-
newing after
demand can
be fixed.
What is a rea-
sonable time
must depend
on the circum-
stances of
each case.

what was the practice of the Courts of Equity in Ireland before it passed. When the case was one of simple neglect, it was relievable. Where the case went beyond simple neglect, it was not the practice in Equity to relieve.

In my humble opinion, and I have frequently had occasion to consider this act, the meaning of it is, that the moment a demand is made, the neglect, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect, and becomes wilful. Lord Clare had the same view of the meaning of the act. "Reasonable time," he says, "within the act shall be deemed only that time which is necessary to give the tenant full opportunity for ascertaining when the *cestui que vies* died, for computing the amount of the fines due, and for preparing the leases. The precise time cannot be defined." That I take to be the true meaning of the act; and it must depend upon the particular circumstances of each case, whether the tenant has applied for renewal within the proper time. It has been contended that some precise time ought to be fixed. But the circumstances are so various that it would be doing great injustice to the tenants to fix any precise time. Every case is different in its circumstances; and a singular circumstance in the present case is, that the only person who had the means of making up the account is agent for the lessee, and had been agent for the lessor; and he had in his possession all the documents necessary for the purpose of making up the account, and no other had them. He therefore, and no other, was competent to make up the account,

and he might have done it in a short time. In the case of *Jackson v. Saunders*,* I was of opinion, and that opinion was confirmed by the decision of this house, that four months, or from four to five months, was, under the circumstances, an unreasonable time: and the circumstances there were, the frequently calling for the fines before a formal demand made. In looking at the act, it does not appear that any *formal* demand is necessary; but, the party having made it, the time is to be computed from the period of that demand: and the prior demands are waved by the subsequent formal demand if the fines are paid within a reasonable time after that demand. But then, I think, it is to be considered what former demands were made with reference to the point of neglect, and the question what is a reasonable time after the formal demand.

In this case it appears from the evidence of Kirby, who stood in the singular situation which I have before mentioned, that demands were made several years before, and that, on Burke's representing that he had paid the fines to the Nashes, Edward Brabazon consented to give some indulgence to Burke, and to receive the profit rent; and then Kirby states, "whereupon the Deponent or the said Edward (Brabazon) desired that the said Bourke should, as soon as he could, endeavour to make up the amount of the renewal fines; for that he, Mr. Brabazon, would not pay any compliment to the Nash family:" and yet this decree gives the benefit of the lease to the Nash Family. Brabazon had given the indulgence merely out of compassion to Burke. Nash having

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LEASE FOR
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NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TS-
NANTRY ACT,
&c.

* *Fid. ante*,
vol. ii. 487.
A formal de-
mand not ne-
cessary; but
when made,
the time is to
be computed
from the pe-
riod of that
demand.
But prior de-
mands to be
taken into
account in
considering
what is a rea-
sonable time
after a formal
demand.

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LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

* Bateman v.
Murray.
Ridge, P.C.

Nash receives
the fines from
his underten-
nant, and does
not pay them
to his land-
lord: this is
fraud in Nash,
and the
Nashes have
no good claim
to a renewal.
State of the
case as to
Burke. Prior
demands.

received the fines from Burke without paying to Brabazon what he had so received, which was a fraud on the part of Nash: so that it comes to the ground on which Lord Thurlow rested in the case of Lady Ross,* which was misunderstood by Lord Lifford, and which, by the by, produced the tenantry act. The ground on which that case was decided, and which was misunderstood by Lord Lifford, was, that the agent for Lady Ross had called upon the other lessees to pay their fines, and he himself had not paid them, though the lives had dropped, which was a fraud. So here it was a fraud in Nash, the receiving the fines from his own undertenant, without paying them over to Brabazon. It is clear then that the Nash family would not be entitled to renewal at their own suit, and yet this decree gives it them at the suit of Burke.

All therefore we have to inquire into is, whether Burke was guilty of wilful neglect after the demand was made. The first demand was made in 1792, and no such arrangement as that contended for took place with respect to the profit rent. That appears by Kirby's evidence. Then the profit rent continues, however, to be received, and no further demand is made till shortly before the death of Edward Brabazon, when, as Kirby states, Brabazon said that he wanted a new coach, and would insist on Burke's paying as much, on account of the renewal fines, as would purchase one, otherwise that he would enforce payment of the entire: and then Kirby wrote to Burke that, unless he did then without delay remit 200 guineas, on account of the fines due for the lands, Brabazon would discontinue

to receive the profit rent. But Kirby says, that the money was not paid. The words are, "saith, said" "Burke did not remit one shilling more than his" "usual payments of the head rent, and some part" "of Nash's profit rent;" so that he did not even remit the whole of Nash's profit rent. This was in 1799. After the death of Edward Brabazon, Barrett, who became entitled, insisted upon payment; and made a formal demand, with notice. It was contended that Barrett ought to have stated the precise sum that was due. But the act does not impose any such duty on the landlord; and it would be great injustice if it did, as he is not likely to be the most cognizant of the lives and deaths, the *cestui que vies* being usually named by the lessees from among their own families, and they are bound by the original obligation to tender the sum due. The lessor often cannot know who the lives are, as they are generally persons of the family of the lessee, and unconnected with the lessor. It is sufficient for the purposes of this act that a demand has been made; and the tenant is to be judged by this question, was it mere neglect or wilful neglect in him that he did not pay the fines? If it were wilful neglect, he is not entitled to a renewal. That is the construction put upon the act by Lord Clare; and Lord Clare knew the views of the legislature when the act was passed: I am, therefore, clearly of opinion that a simple demand is all that is necessary on the part of the lessor. A contrary construction would make property of this kind almost of no value to the lessors. A lease is made for three lives; one of the lives drops; the lessor demands payment of

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LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
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NANTRY ACT,
&c.

Formal de-
mand.

The landlord,
in making the
demand, is
not bound to
state the pre-
cise sum due.

A simple de-
mand is all
that is neces-
sary on the
part of the
lessor.

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1817.

LEASE FOR
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NEWABLE FOR
EVEN—NEG-
LECT TO RE-
NEW—THE
FANTASY ACT,
&c.

the fine; the lessee does not pay; two of the lives still remain, and the lessor cannot recover the property. How is he then to keep alive the memory of the notice and demand? He can do so only by a bill to perpetuate the testimony of witnesses, the expense of which he must pay. But this difficulty is, in fact, imposed on the landlord; and if, in addition to this, he were bound to state the precise sum due when he made the demand, an estate of this kind would be worth nothing. It has been contended that the demand ought to be made upon, and notice given to, all who are interested. I know a property of 13,000 acres in the county of Tipperary, which is covered with leases of this description, divided and subdivided by under leases, five or six deep; and the owner has no conception of all who are interested. All he knows is who is to pay him the head rent and the fines of renewal. The demand, however, according to the construction contended for, must extend to lessees of every description. But when the act speaks of assignees, it means assignees of the whole interest: and this still leaves a difficulty where the whole interest is divided into a great many parts; the effect of which often is to make the interest of the lessor of such small value as to be scarcely saleable in the market. Your Lordships, under these circumstances, will not extend the meaning and benefit of the act beyond cases of mere neglect; and the demand is one circumstance by which wilful neglect is to be established.

In this case, a demand, though not a formal one, was made in 1799. On the death of Edward Brabazon a formal demand was made. What took

place? Burke suffered nine months to pass without doing any thing: and what does he do then? He comes with Kirby and makes a tender; and that, besides other objections, was not sufficient in amount. But could Kirby really have believed that Barrett would have accepted such bills as these? It was merely a delusive pretence, and not a real tender. What Barrett did, was to take a memorandum of the particulars of each note and bill tendered, and cause it to be subscribed by a person present. What passed then? Barrett said, "Burke, have you any more to say;" and was answered, "No:" and upon this it is said that the tender was objected to merely because it was not sufficient in amount. But I take it that it was objected to altogether, not merely as being insufficient in amount, but also because the proper time was passed; and because it was a delusive, and not a real tender, and one which would not have been accepted, even if it had been in time, and to the proper amount; for it was not a tender that could be taken in payment.

This is clearly a case of wilful neglect; Burke having full time to be prepared to meet the demand; and Kirby, who had been agent to Brabazon, being agent for Burke, and having in his possession all the documents necessary for making up the account. Burke was bound to tender the fines, and the leases for execution, and one month was amply sufficient for these purposes. He was bound to offer the fines, and to present the leases for execution, for Barret was entitled to have a tenant acknowledging the tenure, which was an important object in regard

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LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NOT
LECT TO RE-
NEW.—THE
WANTY ACT;
&c.

Burke suffered
nine months
to pass after a
formal de-
mand, with-
out doing any
thing, and
then he made
only an il-
lusory tender.

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LEASE FOR
LIVES RE-
NEWABLE FOR
EVER.—NEG-
LECT TO RE-
NEW.—TE-
NANCY ACT,
&c.

The original
design of these
leases, the
better cultiva-
tion of the
lands, and
more easy re-
covery of rent.

to property of this kind. What was the original object of these leases? Lord Lifford says, that the object was the improvement of the lands, and the more easy recovery of the fines and rents. The original design of these leases, then, was the proper cultivation of inferior lands, and the more easy recovery of the rent, a thing which in Ireland was often very difficult. This tenure was particularly important in the disturbed state of Ireland, as the lands were by that means in the hands of persons acknowledging themselves as lessees; for it often happened that, in the course of many years, no rent was paid, and if they had been simply fee-farm rents, there would be presumptions against them which would often deprive the landlord of his property. The object therefore of this tenure was to preserve the property; and every time the lease is renewed there is an acknowledgment of the tenure; and there is also the benefit of the covenants, which is totally lost if the leases are not renewed. So that it is of very great importance that the lease should be renewed when a life drops; and this is often the chief value of the renewal, the fines being hardly adequate to the expenses of suits.

It is very important therefore that the relief should be confined to cases of mere neglect, and not extended to cases of wilful neglect; and that persons bound to pay the fines and tender the leases, should do so in a reasonable time. In the present case nine months were suffered to elapse before any thing was done, and then there was a jocular,

rather than a serious, tender, and nothing more was done. Nash had clearly forfeited his title by fraud, and the only one to claim was Burke, whose claim was founded merely in the indulgence of Edward Brabazon. Burke had no right, except under that indulgence, his remedy being, in my opinion, only against Nash, and not against Brabazon. I think therefore that these decrees are wrong; that Burke is entitled to no relief as against Barrett; that the issue tendered was nothing as to the merits; and that the decrees ought therefore to be reversed, and the bill dismissed.

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LIVES RE-
NEWABLE FOR
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LECT TO RE-
NEW.—TE-
NANTRY ACT,
&c.

Decrees accordingly reversed, and bills dismissed.

Decrees of the
Court below
reversed;

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2d DIV.)

BLACK—*Appellant.*

CAMPBELL—*Respondent.*

The *set* or constitution of Inverkeithing requiring that the members of council should be resident burgesses, the clerk, at the election of a delegate for that burgh, in 1812, refused to reckon the votes of two persons whose names had been entered in the minutes, as part of the magistrates and town council, assembled for the purpose of the election, and to whom the qualifying oaths had been administered by himself, in consequence of an objection on account of non-residence; the fact of non-residence being notorious and consistent with the clerk's

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1817.

POWER OF
RETURNING
OFFICERS IN
CASES OF
ELECTIONS
OF DELE-
GATES FOR
BURGHES.—
PLEADING.—
EVIDENCE,
&c.

May 7, 9,
1817.

POWER OF
RETURNING
OFFICERS IN
CASES OF
ELECTIONS
OF DELE-
GATES FOR
BURGHES.—
PLEADING.—
EVIDENCE,
&c.

own knowledge; and the rejection of these two votes governing the return. Complaint under the statute 16 Geo. 2. cap. 11. against the clerk, and judgment by the Court of Session, that he had incurred the penalties of that statute, on the ground that the officer was bound by it to reckon the votes of all those whose names appeared as members of council on the burgh records, beyond which he was not entitled to look; and that *bona fides* was no defence. This judgment reversed by the House of Lords for want of averment in the complaint that the complainer was duly elected delegate, the statute having given the penalties to the person so elected. And also for want of sufficient evidence of that fact; the town books, with the names inscribed, the best evidence to show that those whose votes were rejected were members of council, not being produced in proof.

The Lord Chancellor observing, that it is a wholesome principle, in a case so penal as this, that distinct averment and clear proof should be required.

Lord Redesdale observing, that he very much doubted whether the true construction of the act was that which the Court below had put upon it.

Complaint
under 16 Geo.
2. cap. 11.

A PETITION and complaint under the statute 16 Geo. 2. cap. 11. was presented to the 2d division of the Court of Session, at the instance of General Campbell, of Monzie, with concurrence of his Majesty's Advocate, for his Majesty's interest, against David Black, town-clerk of Inverkeithing, stating, that at the election, in 1812, of a delegate for Inverkeithing, for choosing a member to serve in Parliament for that district of burghs, David Black, the clerk, had refused to make out the commission to the complainer, who had been chosen by the majority of the magistrates and town council, assembled for the purpose of electing a delegate; and had given the commission to General

Maitland, who had not been chosen delegate by the majority, and praying the penalties of the statute against the clerk for this violation of its enactments.

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The facts of the case, as averred in the petition and complaint, and as they appeared in the minutes of election, and from the admissions in the pleadings, were these.

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On the 15th Oct. 1812, the magistrates and town council of Inverkeithing, assembled for the purpose of choosing a delegate or commissioner, for the election of a member to serve in Parliament for the district of burghs, to which Inverkeithing belongs. The Appellant, the common clerk of the burgh, entered or marked in the minutes the names of the magistrates and council assembled on that occasion, and administered the oaths required to be taken by the electors of the delegate; and among those whose names were so marked, and to whom the oaths were so administered, were Captain John Montgomerie and Mr. John Gulland.

Facts and cir-
cumstances.
Election,
1812, of de-
legate for In-
verkeithing.

In the course of the proceedings Sir John Henderson, one of the council, objected to the votes of Captain John Montgomerie and Mr. John Gulland, and of Duncan and Alexander Montgomery, for non-residence, referring likewise, with respect to the three Montgomeries, to a decision of the Court of Session, in Feb., 1807, finding that they had no right to be councillors: and he called on the clerk, not only not to receive their votes, but also not to call their names in the course of any vote which might that day take place in the council. General Campbell, who was then Provost of the burgh, objected to the votes of Sir John Henderson and three

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votes for non-
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others, and protested that their names should be erased from the list, and that their votes should not be received, and, if received, that they should be null and void. The objection to one was, that he lay under sentence of fugitation and outlawry; to another, that he had not for a long series of years acted as a member of the council; to a third and fourth (Sir John and Mr. Bruce Henderson), generally, that they were not duly qualified to vote. The answers, as they appeared on the minutes, were, as to the first individual, the production of an extract of an act and warrant of the Court of Justiciary, reponing him against the sentence; as to the second, that the objection was frivolous; and, as to the third and fourth, that the objection was too general.

The summoning officers, on being examined in the usual manner as to their having warned the members of council to attend, stated, that they had served the summons on Mr. Gulland, at his house at Bellknows, and on Captain John Montgomerie, at the distillery. It was asserted in the pleadings, and not denied, that Bellknows and the Distillery were without the burgh, that Bellknows was the usual place of residence of Mr. Gulland, and Chatham of Captain Montgomerie.

Judgment of
the returning
officer.

The clerk did not give any deliverance as to the objections by General Campbell. His judgment on the objections by Sir John Henderson, as it appeared on the minutes, was as follows, "Which protests, answer, reply, and duply, having been considered by the clerk, he finds, that no evidence of the alleged decree of the Court of Session

“ has been produced sufficient to authorize him to
 “ strike off the names of Mr. Duncan Montgomerie,
 “ and Mr. Alexander Montgomerie, from the Coun-
 “ cil roll.

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“ He is, however, decidedly of opinion, that the
 “ objection stated against the votes of Captain John
 “ Montgomerie, and Mr. John Gulland, founded
 “ on their non-residence within the Burgh, (which
 “ is a circumstance of notoriety, and consistent
 “ with his own private knowledge,) is a good ob-
 “ jection, and that they are not legal councillors of
 “ this Burgh. He would therefore have no hesita-
 “ in setting aside both their votes, if it was clearly
 “ competent to him to determine that matter ; but
 “ not being satisfied, that it is his duty, as returning
 “ officer, to judge of the validity of the votes which
 “ may be tendered to him upon the present occa-
 “ sion ; resolves not to call for, but to mark the
 “ votes which may be tendered under protest by
 “ Captain John Montgomerie and Mr. Gulland, re-
 “ serving for consideration, when he shall decide
 “ in whose favour the commission is to be made
 “ out, the legal effects of such votes, and whether
 “ or not the same ought to be received ; declaring,
 “ that notwithstanding his own conviction of the
 “ real invalidity of any votes to be tendered by
 “ Captain Montgomerie or Mr. Gulland, he shall
 “ reckon them before making out a commission in
 “ favour of a delegate, if, after due consideration
 “ and advice, he shall find, that it is not strictly
 “ competent to him, as clerk of the burgh, to de-
 “ cide the question of their legality or illegality,
 “ and to reject them accordingly.”

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Set or consti-
tution of In-
verkeithing.

The names of Captain John Montgomerie and Mr. Gulland not being called, there appeared thirteen votes for General Maitland, and twelve votes for General Campbell. Captain Montgomerie and Mr. Gulland then came forward and voted for General Campbell "protesting that they ought to have been called by the clerk, and ought now to be added to the list of those who voted for General Campbell. Whereupon General Campbell protested that he was duly elected delegate of this Burgh, and required the clerk immediately to make out a legal commission in his favour, and thereupon took instruments: and Sir John Henderson protested that General Maitland was duly elected delegate by a majority of votes, and required the clerk immediately to make out a legal commission in his favour, &c."

The set or constitution of the Burgh of Inverkeithing as far as it appears material to the present question is in these words: "The council consists of fifteen persons at least; viz. the Provost, two Baillies, the Dean of Guild and Treasurer, and ten or more *inhabitant Burgesses*. They proceed in their election thus: Upon the 29th Sept., yearly, the magistrates and old council meet in the forenoon within their tolbooth; and when these of the old council who are desirous of an ease have demitted their offices, they choose as many new councillors in their room to keep up the number; and first they elect the provost, then leets five of the council, and choose two out of them bailies of the ensuing year; next leets three and chooses the dean of guild; and last,

"two, and chooses the treasurer: all swearing the
"oaths *de fidei* and secrecy, &c." These were

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pointed out as peculiarities in the constitution of the burgh; 1st, that the number of councillors is unlimited; 2d, that there is no annual election of the whole council, though there is an annual election of magistrates, the councillors once chosen continuing for life unless they resign or become disqualified. 3d, The councillors must be burgesses having residence within the burgh.

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The clerk intimated his intention to apply to Mr. Adam (now the Lord Chief Commissioner) for advice whether he ought to reckon the votes of Captain Montgomerie and Mr. Gulland, and requested the counsel who had attended the election on the part of General Campbell, and the agent who attended on behalf of General Maitland, to go with him to Mr. Adam. The former declined going, and then the clerk went alone; and having laid the minutes of the proceedings and circumstances of the case before Mr. Adam, he, in conformity to the advice received, rejected the votes, and made out the commission in favour of General Maitland; and thereupon the petition and complaint was presented by General Campbell.

Clerk rejects
the votes.

It is to be particularly observed that there was no averment, in the petition and complaint, that General Campbell was duly elected delegate. The books or records of the burgh were not produced to show that the names of Captain Montgomerie and Mr. Gulland were there inserted as members of council, and that General Campbell was duly elected; and there was no distinct admission of these facts on the

Defect of
averment and
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Act. 16 Geo.
2. cap. 11.

part of the clerk; the circumstances of his having entered the names of Captain Montgomerie and Mr. Gulland in the minutes, and his having administered the oaths to them, not being considered by the House of Lords sufficient to constitute an admission that they were members of council.

The clause on which the complaint was chiefly founded was the 26th of the statute 16 Geo. 2. cap. 11. which provides, "That at every election of commissioners for choosing burgesses for any district of burghs in that part of Great Britain called Scotland, the common clerk of each borough within the said district, shall make out a commission to the person chosen *by the major part of the Magistrates and Town-Council assembled for that purpose*, which Magistrates and Town-Council shall take the oath of allegiance, and sign the same, with the assurance, and shall take the other oaths appointed to be taken at such election, by this or any former act, if required; and the said clerk shall affix the common seal of the burgh thereto, and sign such commission; *and shall not on any pretence whatsoever, make out a commission for any person as commissioner, other than him who is chosen by the majority as aforesaid*; and if any common clerk of any borough shall neglect or refuse duly to make out, and sign a commission to the commissioner elected by the majority, as aforesaid, and affix the seal of the burgh thereto, *or if he shall make out and sign a commission to any other person who is not chosen by the majority*, or affix the common seal of the burgh thereto, he shall for every such offence for-

“feited the sum of 500*l.* sterling to the person elected
 “commissioner for the said burgh, as aforesaid, to
 “be recovered by him or his executors in the man-
 “ner herein after directed; and shall also suffer im-
 “prisonment for the space of six calendar months,
 “and be for ever after disabled to hold or enjoy the
 “said office of common clerk of the said borough;
 “as effectually as if he was naturally dead.”

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And a subsequent clause declares, “That every
 “penalty or forfeiture by this act imposed in that
 “part of Great Britain called Scotland, shall, and
 “may be sued for, and recovered by way of sum-
 “mary complaint, before the Court of Session,
 “upon thirty days notice to the person complained
 “of, without abiding the course of any roll; which
 “said complaint the Court of Session is hereby au-
 “thorized and required to determine; as also to
 “declare the disabilities and incapacities, and to
 “direct the imprisonment as herein provided.”

The judgment of the Court of Session was as fol-
 lows: “The Lords having advised this petition,
 “with the answers, replies, and duplies, and writs
 “produced and referred to, sustain the complaint:
 “Find, that the Respondent, David Black, has for-
 “feited the sum of 500*l.* sterling, and decern
 “against him for payment thereof to the com-
 “plainer; order the said David Black to be im-
 “prisoned for the space of six calendar months, and
 “declare him for ever disabled to hold or enjoy the
 “office of common-clerk of the burgh of Inver-
 “keithing, as effectually as if he was naturally dead:
 “find him liable in the expences of this complaint;
 “allow an account thereof to be given in, and remit

May 22, 1813.
Interlocutor
first appealed
from.

Jan. 15, 1814.
Interlocutor
second ap-
pealed from.

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“ to the auditor to tax the same and report.” And to this judgment their Lordships unanimously adhered, on advising petitions with answers. From this judgment the clerk appealed.

The Court was unwilling to carry the imprisonment into effect until the appeal should be determined, lest the judgment should be reversed; and the complainer agreed not to call for the imprisonment in the mean time.

For the Appellant it was contended that in cases of burgh elections for delegates the statute afforded no fixed rule for the guidance of the officer; that there was no roll in any burgh in Scotland to which the officer might refer, as there was in cases of elections of members for counties; and that from the peculiarity of the *set* of Inverkeithing, where there was no annual election of the whole council, it was impossible there could be such a roll; that the clerk was therefore under the necessity of exercising his judgment, and of deciding, attending to the constitution of the burgh, whether the persons objected to were legally members of the council; that by the constitution of the burgh residence was an essential qualification for a councillor; and that a person, though regularly admitted, and though the councillors were for life, by becoming non-resident ceased, *ipso facto*, to be a councillor; that in a case in 1745 reported by Lord Elchies, the Court expressly found “ that by the *set* of this burgh “ councillors behoved to be *residing* burgesses;” and it had always been understood to be the law that the mere circumstance of non-residence operated as a disqualification. Objections on that ground had

Elchies, Rep.
No. 22. v.
Burgh Royal.

been made in 1760, 1774, and 1791, and the answer had uniformly been a denial of the fact, the relevancy not being disputed. The set and practice would have been sufficient; but the point had been adjudged by the Court of Session and House of Lords in the case of *Haldane v. Holborn*.* There was another authority to the same effect in Bankton, in his work published in 1752. The decision of the second division in Clarkson's case, 14th May, 1814, was different; but when the return in this case was made, the clerk had the authority of the Court of Session and House of Lords in his favour; and also a judgment of the Court in 1807, ordering the name of Captain Montgomerie to be struck out of the list of councillors on account of non-residence. The town clerk having been called upon to exercise his judgment, acted throughout *bonâ fide*, and this was a good defence, even though his decision were erroneous; and had been so held in cases less favourable to the returning officer, as in the case of Culross, arising from the annual election of 1803. The present case was essentially different from that of *Gordon v. Forbes*, not only because it was incontrovertibly clear from the very statute under which Forbes acted as a commissioner of supply that he was not qualified, but also because Forbes was not bound to act, and Black was. This was not a singular example of a case not provided for by the statute; there were many others, such as that of *Gordon v. Rose* in 1768, referred to by Wight and Bell, and that of *Glass v. Magistrates of St. Andrews* in 1754. That the clerk had in this case acted *bonâ fide* was evident from the whole

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* Kames, Sel.
Dec. v. Cita-
tion.

— v. Mont-
gomerie,
(case of Inver-
keithing,) 1807. Vid.
Wight, p.
338.—Case of
Elgin, 1771.
—Young v.
Johnston,
1766.

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proceedings. The fact of non-residence was clear, and had been admitted in the pleadings on both sides. The objection of non-residence had indeed been made on former occasions, but the clerk was not bound to decide upon it till it became material to the return; and for the same reason the entry of the names in the minutes, and the administration of the oaths by the clerk, was no admission on his part that the parties were members of council. As to General Campbell's objections they were not specific, and it was therefore not necessary to give any decision upon them. The clerk then did give the commission to him who had the majority of legal votes. But supposing the clerk not to have the right to act as he had done, General Campbell had himself called upon him to exercise his judgment, and reject votes as bad for non-residence; and the complaint was therefore barred *personali exceptione*. It was also argued that this being a penal statute the strictest construction ought to be applied, and that, as the complaint was in the nature of a criminal prosecution, it was necessary that a criminal purpose should appear before the penalties could be incurred.

Bell v. Ma-
gistrates of In-
verkeithing,
1777.

For the Respondent it was argued that the act 16 Geo. 2. cap. 11. applied to all the burghs in Scotland; that there was a particular provision as to the county of Sutherland, but none as to the burgh of Inverkeithing, and that those who prepared the act must have been well acquainted with the constitution of Inverkeithing. If the act did not apply, the rights and privileges of the councillors of this burgh were at the mercy of the clerk. The notion

that the defect in the act was to be supplied by the judgment of the clerk was founded on a single expression in the set, that the councillors must be inhabitants; and it was said that they must be so not only when admitted, but that by their non-residence they *ipso facto* ceased to be councillors. But the import of the clause in the constitution, declaring that the council was to consist of fifteen persons who must be inhabitant burgesses, was by no means clear; and many instances might be cited from the records of the burgh of persons admitted and acting as councillors who did not reside within its precincts. The case in 1745, from Lord Elchies, was too shortly stated to be considered as an authority, and that of *Haldane v. Holborn* reported by Lord Kames under the title *Citation*, depended on a principle which had no application to the present question. It might be doubted also whether councillors regularly admitted, whose election remained unchallenged for two months from the period of admission, could be removed by the magistrates at a subsequent annual election, or by the Court of Session, upon the ground of a supervenient disqualification; the councillors being for life by the *set* of the burgh. And though in one judgment of the Court of Session in 1807 a different rule was adopted, that was a single judgment reclaimed against, and was no authority. But supposing that a councillor must be resident within the precincts, and by non-residence became disqualified, his name must remain on the record till expunged by the council or Court of Session, according to the mode pointed out in the judgment of 1807; and the clerk

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was not entitled to look beyond that record. But supposing this mode of redress under the statute to be incompetent, the question recurred whether the enrolment of the councillor was to be held null *ipso jure*, and whether the nullity might be declared by the *fiat* of the clerk. The doctrine was adverse to every principle of the law of Scotland, in which no instance could be pointed out of effect being given to an irritancy of a vested right, without a declarator. The clerk had no right to look beyond the record, and was bound by the statute to reckon the votes of all whose names appeared there. The statute had clearly ascertained who were the magistrates and town council, or persons by whom the delegate was to be chosen; that they were those persons who had been enrolled by the votes of a majority of magistrates or other persons, who by the constitution of the burgh had a voice; and that upon that roll or book or list they must remain till ordered to be struck off, and till they were struck off either by the magistrates themselves at a subsequent annual election (for it was possible to conceive a burgh where this might be competent), or by an extracted decree of the Court of Session, upon an application under the statute; that the title of the elector of a delegate consisted in the entry of his name in the burgh record under the keeping of the town clerk, and that every man whose name was to be found there, entered as a magistrate or councillor, must be admitted and inserted at the meeting for election; that in the present case Captain Montgomerie and Mr. Gulland were admitted, entered in the minutes, and qualified; and that no

exertion of the mental faculty was required or permitted on the part of the clerk, but to count the votes of this meeting, which constituted the town council assembled. The duty of the clerk was clear and imperative. He was bound to call all the names which stood on the record or books of the burgh as councillors, without taking upon him to judge or determine whether they ought to be there or not ; and by entering the names of Captain Montgomerie and Mr. Gulland on the minutes, and administering the oaths to them, the clerk had in this case admitted that their names stood in the books as members of council. The statute 16 Geo. 2. cap. 11. applied to all the burghs in Scotland, and the difference between the phraseology of that statute and of those previously in force (2 Geo. 2. cap. 24. and 7 Geo. 2. cap. 16.) particularly the omission in the last statute (16 Geo. 2.) of the words "to the best of my judgment" in the oath of the returning officer, and of the word "wilfully," in the clause imposing the penalty for neglect to return the person duly elected, was relied upon in support of the proposition that the clerk was bound by the record without any further exercise of judgment. The duty of the clerk was clear and imperative, and *bona fides* was in this case no defence ; and upon that principle the case of *Gordon v. Forbes* had been decided. But the clerk had never before rejected votes on the ground of non-residence, though the objection had been made at former elections, and it was clear therefore that he had not acted *bona fide*. The opinion of Holt, Ch. J. in the case of *Ashby v. White*, relative to the duty of a returning officer, was quoted. The

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2 Geo. 2. cap.
24. sect. 3.
7 Geo. 2. cap.
16. sect. 8.
16 Geo. 2.
cap. 11. sect.
35.

Vid. Sta. Tri.
Oct. Ed. vol.
14, p. 789.

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object of the act was to deprive the clerk of all judgment respecting the votes; his duty being confined to looking at the council book; and if the names of the persons claiming to vote appeared there as members of council, he was bound to reckon them. (*Lord Eldon, C.* Must not the town books be produced to prove that General Campbell was duly elected commissioner? That must be proved, as the penalty is given by the statute to the person duly elected commissioner. In a case of this kind you must be held to strict proof.) It appeared from the minutes that he was duly elected. (*Lord Eldon, C.* If this statute affects a person whether he acts *bonâ fide* or not, and there are such acts both in England and Scotland, then we may have to determine here that the clerk has incurred the penalties of 500*l.* fine, and six months imprisonment, and incapacitation, even though he might have acted *bonâ fide*; and the act says that these may be sued for and recovered by way of summary complaint. If a subject in this country were made liable to such penalties, and his acting *optima fide* were no defence, though the penalties might be sued for by summary complaint, yet we would take care that it should contain all the averments necessary to make out the case. If such a petition had been presented here it would have required averment that Captain Montgomerie and Mr. Gulland were part of the magistrates and town council assembled, and held that character; and that General Campbell was duly elected delegate by the majority, as the penalty of 500*l.* is given to the person elected commissioner. And we would re-

quire not only that the averments should be nice and precise, but we would also require strict proof; and I suggest that to Mr. Erskine, that he may consider whether there is averment, or evidence, or admission enough to support this judgment.) *Mr. Warren.* There are two averments in the petition and complaint; 1st, That General Campbell had the majority of votes. That appears by the minutes. 2d, That the commission was not made out for General Campbell. That does not appear in the minutes, but it is admitted by Black; for he answered without objecting, and the whole of his reasoning proceeds on the supposition that the commission was not made out for General Campbell. If he had objected it would have been proved. (*Lord Eldon, C.* If this had been a case in the law of England, could there have been any proceeding without the production of the commission itself?) Not in England. (*Lord Eldon, C.* Then suppose this a proceeding in England, would not the judgment be wrong on another ground? Suppose it bad as to the imprisonment, I take it that if it is bad in part it would be bad in the whole. But here nothing is said as to the place where the imprisonment is to be, nor when it is to commence. Now I take it that in England you cannot order an imprisonment to commence *in futuro* except where you are ordering two imprisonments at the same time.) Certainly if this had been an English proceeding, these objections would have been unanswerable. (*Lord Eldon, C.* We could not proceed a step here without the production of the town books.) *Mr. Erskine.* We produced authentic extracts. (*Lord*

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Eldon, C. I take it to be clear that it is not sufficient that the clerk entered the names in the minutes, and qualified them by administering the oaths, as he might be mistaken ; and here, in order to prove that they were councillors, it would be necessary that the books should be produced. We are here upon a statute as severe in its penalties as can well be.) *Mr. Erskine.* I can only state that we have evidence here as far as Black himself held it to be material, and in the pleadings by Black our statement was acquiesced in as true. He would have been heard on the competency, as well as on the merits. (*Lord Eldon, C.* There is no averment, evidence, or admission, that I see, that these names were taken from the council books. *Lord Redesdale.* You ought to have proved two things : 1st, that General Campbell was duly elected commissioner ; 2d, that Black made the return contrary to the majority of legal votes. *Lord Eldon, C.* Who are the magistrates and town council ? those that appear as such on the books. But there is no evidence that these names were there, equal to the best evidence. *Lord Redesdale.* By the constitution of the burgh you should prove that they were inhabitant councillors, in order to show that you were duly elected. *Lord Eldon, C.* Where in the pleadings does it appear that these names were on the books ? It is clear that all in the sederunt were summoned, and that the names were taken down. But is it proved that those summoned and present were town councillors ?) *Mr. Erskine.* Our averment is that all these names in the sederunt were in the record ; and that is not contradicted. (*Lord Eldon, C.* Where is that

avermment in the complaint?) *Mr. Erskine.* With respect to the terms of the judgment, a second petition might have been presented below as to the time of commencement and the place of imprisonment. The reason why we did not insist upon it was, that the clerk might not be deprived of the benefit of his appeal.

In the reply, the point of want of sufficient averment and proof, first suggested by the Lord Chancellor, was insisted upon. In a case so perilous as the present, the defender was perfectly justified in allowing the complainer to go on proving as he chose, without stating any objection while the defect might be rectified; and then, if the judgment should be against him, taking advantage of the defect upon appeal to a higher tribunal.

Sir Samuel Romilly and *Mr. Murray* for the Appellant; *Mr. Warren* and *Mr. Erskine* for the Respondent.

Lord Eldon (C.) This case arose out of the conduct of Mr. Black, who your Lordships will recollect was town clerk of the burgh of Inverkeithing, and the petition and complaint which I have now before me states, "That by an act passed in the 16th year of his late Majesty entitled 'An act to explain and amend the laws touching the elections of members to serve for the Commons in Parliament for that part of Great Britain called Scotland, and to restrain the partiality and regulate the conduct of returning officers on such elections,' it is declared by the 22d section that

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Judgment.
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Petition and
complaint.

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 "Parliament for the districts of boroughs in that
 "part of Great Britain called Scotland, it often
 "happens that more persons than one claim to be
 "admitted to vote as commissioners for the same
 "borough, which furnishes pretences to the clerks
 "of the presiding boroughs for partially making
 "false and undue returns : For remedy thereof, be
 "it enacted by the authority aforesaid, that at the
 "annual election of magistrates and councillors, and
 "in all the proceedings previous to the election of
 "the magistrates and councillors for the succeeding
 "year—" (Recites the 22d, 23d, and 24th sects.)

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Elections for
 counties.

The petition and complaint then proceeds to state the 26th section of the act. But first I would call your Lordships' attention to the previous provisions which regulate the elections for counties : and there undoubtedly the legislature has prescribed, to the person who is to collect the votes, a clear and intelligible rule of conduct, from which if he deviates, it is his own fault ; since the rule is so clear and plain that he cannot mistake it : for it is enacted, " that at every election of a commissioner " to serve in parliament—" (reads sect. 12 and sect. 13, except the last part relating to equality of votes). So that there being a roll of persons who are to be taken as electors, if their names are upon that roll, the plain rule, by which he is to regulate his conduct, is to allow the vote of every man who is upon the roll, without taking upon him to decide whether the name is properly inserted or not ; and, on the other hand, to refuse the vote of every person whose name is not upon the roll.

Your Lordships will observe, that by the 22d sect. of the act, which I have before read, it appears to be taken for granted, that there is in every burgh in Scotland an annual election of all the magistrates and councillors, which, as I find from these proceedings, is said not to be the case with Inverkeithing.

Then by the 26th section, it is enacted, "that at every election of commissioners, for choosing burgesses for any district of boroughs in that part of Great Britain called Scotland, the common clerk of each borough within the said district, shall make out a commission to the person chosen commissioner by the major part of the magistrates and town council assembled for that purpose; which magistrates and town council shall take the oath of allegiance, and sign the same, with the assurance, and shall take all the other oath appointed to be taken at such election, by this or any former act if required: and the said clerk shall fix the common seal of the borough thereto, and sign such commission, and shall not on any pretence whatsoever make out a commission for any person as commissioner, other than him who is chosen by the majority as aforesaid: and then comes this very strong and severe clause, which I am about to read to your Lordships: *and if any common clerk of any borough shall neglect or refuse duly to make out and sign a commission to the commissioner elected by the majority as aforesaid; and affix the seal of the borough thereto, or if he shall make out and sign a commission to any other person, who is not chosen by the majority, or affix the seal of the*

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*“borough thereto, he shall for every such offence
“forfeit the sum of 500l. sterling:” but that forfei-
ture is, in the express language of this clause,
“to the person elected commissioner for the said
“borough as aforesaid, to be recovered by him or
“his executors in the manner hereinafter directed,
“and shall also suffer imprisonment for the space of
“six calendar months, and be for ever after disabled
“to hold or enjoy the said office of common clerk
“of the said borough, as effectually as if he was
“naturally dead.”*

The rule here given to the clerk is, that he is to grant a commission to the person who has the majority of the magistrates and town council assembled, and that he is to withhold the commission from him who has not that majority; and he is to do, and forbear to do, these respective acts at the hazard, not only of forfeiting 500l. to the person elected commissioner, but also of suffering six months imprisonment, and that sentence of degradation and infamy which disables him to hold or enjoy the office of common clerk of the burgh as effectually as if he were naturally dead.

Notwithstanding all that one has read in these papers, and heard at the bar, respecting the difference between the language of the above mentioned clause, and that of the penal clause in 7 Geo. 2. and the difference between the words of the oath to be taken by the returning officer as prescribed in 16 Geo. 2. and the words of the oath to be taken by him as prescribed in 2 Geo. 2.—I say, notwithstanding all we have heard as to the language of former acts of parliament, one of which says, that if the returning officer “shall wilfully annex to

7 Geo. 2.
cap. 16. sect.
8.

16 Geo. 2.
cap. 11. sect.
35.

2 Geo. 2. cap.
24. sect. 3.

“to the writ any false or undue return, &c.” he shall forfeit 500*l.*; while the other requires the officer to swear that he “will return such person or persons as, *according to the best of his judgment*, shall appear to him to have the majority of legal votes;” and notwithstanding the observations made respecting the omission, in the act 16 Geo. 2. of the word “*wilful*” in the penal clause, and the words, “according to the best of my judgment,” in the oath—it is impossible, I think, not to regret that, when this act of parliament was made, which distinctly pointed out the rule with respect to counties, the clerks of burghs were left to regulate themselves by this direction, that they were to return according to the majority of magistrates and town council assembled, the statute itself giving no direction by reference to the roll of those annually elected, and much less by reference to the records of such a burgh as Inverkeithing, where there is no annual election; and that if they committed a mistake they were to be liable in the penalty of 500*l.*, and six months incarceration, and rendered incapable of holding the office of town clerk as effectually as if they were naturally dead. One cannot help regretting that an act, so penal in its consequences, was not rendered so plain, that he who runs might read, and he who read must understand his duty, as is done with respect to those who are to perform this duty in county elections. However, it is not so in the act; and yet if this be the right construction which they put upon it, the clerk, in case of mistake, is liable not only to this forfeiture of 500*l.* to the penalty of

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May 16, 1817. **six months imprisonment, and incapacitation for life, but also to a prosecution for perjury. Where an act of Parliament is so frightfully penal as this is, I trust, I do not go too far when I say, that in no part of this kingdom can it be permitted that a person should be found to be so liable upon loose pleadings, and on proof which does not contain the essence of the crime charged.**

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Petition and
complaint.

I now proceed to state this petition and complaint, which I protest I cannot read without pain. No court in this part of the island, I am sure, would permit such matter as I am now about to read to remain on its records; and I say so the more readily, as your Lordships have heard it stated at the bar, that it was a surprise upon one of the judges who had signed it. If this act shuts out altogether the question of *bond fides* (and whether it does I do not mean now either to assert or deny), and renders it imperative on the clerk, whatever his own judgment may be as to the qualification, to return according to the majority of those who have the character of magistrates or councillors, whether they ought to have it or not: if such be the meaning of the act, it would be enough in this petition and complaint, charging the clerk with having incurred a penalty of 500*l.* charging him with an offence for which he was liable to be imprisoned for six months, with a crime which rendered him liable to infamy and incapacitation, and to a prosecution for perjury; temperately and soberly to have stated that such persons were convened for the purpose of choosing a delegate, that he did not return according to the majority, and that the consequences of

the law attached upon him. The mistake of the clerk in thinking that he ought to exercise his judgment as to who were or were not councillors, if it was a mistake, seems to have been so common among the persons present, certainly among the principal persons, that it might have led him, who preferred the complaint, to have done so in terms as moderate and temperate as the necessity of the case would allow. But instead of that the petition and complaint proceeds thus :—" These severe but " necessary penalties, thus enacted by the legislature " against the partiality, fraud, and malversation, " of the common clerks of burghs in matters of " election, have hitherto in general been found sufficient to achieve the objects for which they were " intended ; and it was to have been expected that " the example which was recently made by your " Lordships, &c.," then referring to what had happened to the town clerk of another burgh, whose name I will not mention, because I hold it to be one of the most sacred duties of a judge, when a person has undergone the punishment of the law, and the law has done with him, never to mention that man's name if that will do him any farther prejudice. " But in the late election for Inverkeithing, " a striking example has been afforded of a public " officer, who, disregarding alike the provisions of " the statute, and the solemn warning given by " your Lordships, and who, totally unrestrained by " the obligation of his oath, the fear of disgrace, " and of condign punishment, has, after mature " consideration, and with his eyes open, incurred " the whole penalties of the law, and subjected

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“ himself, over and above, to a criminal prosecution, and the consequences of deliberate perjury.
 “ The misguided and the guilty individual who has thus had the audacity and wickedness to expose himself to the vengeance of the law is *David Black*, town clerk of Inverkeithing: and against him the complainer, impelled by a sense of the duty which he owes to himself, to the community of which he is a member, to the independent burghs whom he has the honour to represent in parliament, and to the public at large, now calls on your Lordships to award to the fullest extent the penalties of the statute. In order that your Lordships may be more fully able to appreciate the motives—” (This is a proceeding, observe, in which the complainer contends that the motives are not a proper subject of judicial consideration:)—
 “ which could have induced an individual to pursue a line of conduct which must be attended with consequences so fatal to his fortune and his reputation: it is proper to mention, that, at the late general election, there were two candidates for representing in Parliament that district of burghs to which Inverkeithing belongs, *viz.* the Honourable Lieutenant General Thomas Maitland, and the complainer. The former of these was supported in his canvas by those partizans in the vicinity of Inverkeithing, and by other individuals of greater note, whose predilections, it is notorious, accorded with those political sentiments which the said David Black has continually and openly avowed. At the last Michaelmas election the greater part of the council, amounting to

“ twenty-seven in number, were cordial in sup-
 “ porting the interest of the complainer. But from
 “ the extraordinary zeal and activity with which the
 “ canvas was carried on ” (this is pleading !) “ by
 “ those indefatigable individuals with whom the
 “ complainer had to contend, and particularly by
 “ the Earl of Lauderdale (a peer of the realm),
 “ Lord Maitland, and Mr. James Gibson, writer to
 “ the signet; thirteen members of the council, pre-
 “ vious to the day of electing the delegate (which
 “ took place only a fortnight afterwards), were in-
 “ duced to rally round the standard of General
 “ Maitland. Fourteen members of council how-
 “ ever remained steady in the interest of the com-
 “ plainer; and hence it was obvious that the whole
 “ enterprise on the part of the General must prove
 “ abortive, unless, either by open force or secret
 “ fraud, the legal majority should be deprived of
 “ its due influence in the approaching election.
 “ From the eruptions ” (this is pleading !) “ which
 “ were, during the canvas, frequently observed to
 “ be made from the coal-pits in the neighbourhood,
 “ by a class of men whose services upon such ad-
 “ ventures your Lordships are not to be informed
 “ had more than once been resorted to, apprehen-
 “ sions were entertained that the contest was to be
 “ decided by those friends to the freedom of elec-
 “ tion. But a recollection of what such an appeal
 “ to the bowels of the earth had formerly cost some
 “ of the individuals at present engaged, seems to
 “ have prevented a repetition of that controlling and
 “ decisive argument. The latter mode of warfare
 “ was accordingly at length resolved on, which,

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“ though attended with less danger, both to the
“ purses and the persons of the leaders, was in its
“ result equally powerful. Fortunately for the suc-
“ cess of their measures, they had an ally who had
“ both the means and the inclination to serve them.
“ This was no other than the said David Black,
“ whom the result has proved to have been a willing
“ and ready tool, prepared to go all lengths in ad-
“ vancing the views of those who had thus deter-
“ mined to avail themselves of his assistance.” And
then, after some other circumstances, it goes on to
state the minutes of sederunt, and a list of the ma-
gistrates and councillors present, as to whom it is
only necessary to mention the names of John Mont-
gomerie and John Gulland. There had been some
proceeding against them in the Court of Session, to
remove them from the situation of councillors of
this burgh; and an interlocutor for removing them
had been pronounced; but against that a reclaiming
petition had been presented, and the judgment did
not become final; and I think the fair conclusion is,
that they were not removed by that proceeding.

Then it has been said that the clerk administered
the oaths to these persons, and that therefore he
must be guilty of this offence.

The meeting being thus constituted, Sir John
Henderson entered an objection to the votes of Ge-
neral Campbell, Duncan Montgomery, Alexander
Montgomery, and Mr. Gulland, and called upon
the clerk, not only not to receive the votes of these
four persons, but also not to call their names in the
course of any vote that might that day take place in
the council. The answer to this is stated in the

minutes to which I refer your Lordships. And then there follows, in the petition and complaint, this assertion—"That there is an omission in the minutes
 "is therefore unquestionable; but it is obviously
 "of no consequence whatever, as let the pleadings,
 "which the parties interested might make, be what
 "they would, David Black was bound himself to
 "have known the limits of his own duty, and to
 "act accordingly." Granting them that, still the complainer was bound to show that he had been duly elected commissioner.

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The petition and complaint then proceeds:—
 "From what transpired during this discussion, the
 "complainer has already mentioned, that he saw
 "very well that David Black was prepared to go
 "all lengths, and that he had determined to act as
 "if he had been appointed by law, not for the pur-
 "pose merely of receiving the votes of the magis-
 "trates and town council assembled, but to judge
 "of the validity of the votes of which that assem-
 "bly was composed, and under that usurped cha-
 "racter to give effect to the objections which had
 "been stated to the votes of four of the individuals
 "in the complainer's interest. In this situation he
 "thought it adviseable, in order that the corrupt
 "determination of this individual to promote the
 "views of his political partizans might be more
 "glaringly exposed, to state similar objections to a
 "number of individuals who were much more ob-
 "noxious thereto than those against whom Sir John
 "Henderson entered a protest, satisfied, that if his
 "suspicions were well founded, David Black would

Petition.

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The judges however got over this. According to the notes which I have before me, one of them said, "At first I was stumbled by it, but I think General Campbell just said, 'Since you are to exercise such a power, do it fairly.'" Another says, "As to the personal objection to General Campbell, I should think if his motion had misled Black, or contributed so to do, it would have barred the complaint. But I think that is not in the nature of things, and that plainly he was not misled." Another said that, "Had General Campbell been the first to come forward, and lead Black into error, the objection would have barred his complaint. But it was the other party who led, and then General Campbell was right to make his objection." And the Lord Justice Clerk says, "General Campbell only assisted in misleading." But with respect to this point of personal exception, if the proceeding had been by one of the parties against the other, it might be a material question who was the first to object, and who led the other into error. But it must be recollected that this is a proceeding by one of the parties against the clerk, and what signifies it to him which of them began to mislead, if the other contributed to do it.

General Campbell might, I think, with great propriety have said, "I call upon you to pay no attention to these objections, but, if you do attend to them, I have objections of the same kind to which I call upon you likewise to attend, giving you notice however that you ought to pay no attention to such objections on either side." But if General Campbell made his objections without any explanation, then he in some measure concurs in misleading the clerk; and perhaps the best answer is, the admission of Mr. Black in page 21 of the Answers, that he was not in fact so misled.

It is immaterial whether the clerk was the political friend or enemy of either the one or the other of the parties, or had no political partialities at all. We have nothing whatever to do with that.

It appears that Mr. Black, for his own satisfaction and direction, took the opinion of a gentleman of the name of Adam, whom we have all long known, and who had certainly great practice in the law of Scotland at this bar. Some of the judges very truly and properly stated that Mr. Adam was a good English lawyer; and if Mr. Adam was not then a good Scotch lawyer also, I hope the judges are by this time convinced that he has since improved in Scotch law; and I trust that this difficulty will not arise again. But Mr. Black having thought proper to consult this gentleman, who, besides his extensive practice in Scotch law at this bar, had great experience in election cases; Mr. Adam gave him a reasoned opinion, which as Mr. Black says, led him to make the return which he did make;

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that is, led him to think that, by the constitution of this burgh, a councillor by ceasing to be an inhabitant ceased to be a councillor, and that therefore he might reject these votes, which he accordingly did, and gave the commission to one who was stated in these proceedings not to have the majority of the magistrates and town council; and thereupon the present action was brought.

The judgment is, "That the Respondent, David Black, has forfeited the sum of 500*l.* sterling; and "decern against him for payment thereof to the "complainer. Order the said David Black to be "imprisoned for the space of six calendar months, "and declare him for ever disabled to hold or enjoy "the office of common clerk of the burgh of In- "verkeithing, as effectually as if he was naturally "dead."

An objection was made by one of your Lordships, that as the imprisonment, which was part of the judgment, was put off *sine die*, the judgment could not be sustained. The answer was, that, by the practice in Scotland, application might again be made to apply the judgment, and that then the court fixed the time and place of imprisonment. This is altogether irreconcilable to our notions of law; but, supposing that to be consistent with the law of Scotland, there is another difficulty, which, though I do not mention it as one on which your Lordships are to act, is a difficulty which I cannot at this moment answer; that is, that though the principle may apply to a case where the judgment is for imprisonment only, I doubt whether it ap-

plies to a judgment which gives the fine and imposes the incapacitation, but postpones the imprisonment. Suppose that however to be reconcileable to the law of Scotland.

But it is a wholesome principle in a case so penal as this, that we (always recollecting that we are sitting here at present as the Court of Session) should require distinct averment, and clear proof, to the utmost extent to which they may by the law of Scotland be required. Now it ought, I think, to have been distinctly alleged and clearly proved, that the complainer was duly elected commissioner; and *that* could be made out only by evidence or admission of the other party, that the fourteen persons in his (the complainer's) interest were of the body of the magistrates and town council; and that again, unless admitted by the other party, could be made out only by the production of the roll, made up at the last election in those Burghs where there is an annual election, or the records of the burgh where there is no annual election, if this burgh cannot be considered as out of the operation of the statute.

Having taken every possible pains to understand this case by reading these papers, and attending to the able arguments at the bar, and having particularly asked the gentlemen who argued the case for the Respondent to point out where this distinct averment and clear proof appeared, I have not been able to find them: and I am as much bound to act according to my own judgment, as Mr. Black was bound to have exercised no judgment of his own, supposing that to be the true construction of the

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statute. I do not think that taking the names of the persons assembled, and putting them down in the minutes of sederunt, and the administration of the oaths, which is all that he admits, are sufficient for the purposes of this proceeding. He no where admits, "these are persons whose names are on the records of the burgh, but I think they ought not to be there." He only put down the names of those assembled, who had been summoned by Green the summoning officer, and who had come in consequence of that summons. But to make him liable in such a proceeding as this, it ought to be shown that he admitted that these were persons whose names were on the records; or otherwise, that fact ought to have been established by the production of the records themselves; and without this, it is not proved that the complainer was duly elected by the persons who were the majority on these records.

Suppose an officer, who had to perform the duty at a county election, had refused to admit the vote of one whose name was upon the roll; if he, by that refusal, became liable to the penalties of this statute—and one cannot well see why, in that case, he should not—can a court of justice find him liable without averment that the name of the person whose vote was so refused was on the roll, and without the production of the roll to show that his name was actually there?

Then, whether these votes were or were not improperly rejected, and without going into that; for want of sufficient allegation, and particularly for want of sufficient proof that the complainer was duly elected

commissioner, which resolves itself into another proposition—for want of proof that the names of the persons, whose votes were so rejected, were on the record, my opinion is, that the judgment cannot be sustained.

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Lord Redesdale. I have but a few words to add to the observations which have fallen from the noble Lord, in which I perfectly concur. The legislature meant that the person who should be duly elected commissioner might bring the action; and that the person guilty of the described offence should be liable in certain penalties. The consequence is, that this being a criminal proceeding, the acts must be distinctly alleged and clearly proved, which are necessary to entitle the party to bring the action, and to entitle the court to inflict the penalty.

It does not appear to me that the legislature, though it gave permission to proceed in this summary way, at all intended to dispense with as much precision as would be required in a more solemn and protracted mode of proceeding. But, in looking at the proceedings in this case, there appears no distinct allegation, nor any thing resembling distinct allegation, that the complainer was duly elected commissioner, and, if it is not alleged, it is not in issue.

Then supposing it to be alleged, is it proved? I have found no evidence to prove it as it ought to be proved; for it is clear that it could be legally proved only by the production of the town council books, and it is admitted that they were not pro-

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duced; so that it stands on the evidence of the minutes taken at the time of election, which are not sufficient to prove the fact that the complainer was duly elected commissioner.

The same proof is necessary to show, that the persons who voted, or offered to vote for the complainer, formed the majority of the body of the magistrates and town council, of which there is no proof. I think, therefore, that these proceedings loosely begun were as loosely carried on; that what ought to have been alleged was not alleged; and that what ought to have been proved was not proved; and that the Court therefore could not properly give judgment according to the act of parliament.

Doubts whether, with respect to clerks of burghs, the true construction of the act is that which the Court below put upon it.

But though there had been distinct allegation and clear proof that the complainer had been duly elected commissioner, I very much doubt whether the true construction of the act is that which the Court below has put upon it: for the statute has not drawn the same line for the conduct of persons in Black's situation, as it has done for the conduct of returning officers in county elections. In county elections a clear line is drawn; and the officer, by adhering to the prescribed rule, acts without peril. But here the officer is to seal the commission to the person elected by the majority of the magistrates and town council: but then the statute has drawn no line by which the officer is to determine who are the majority of the magistrates and town council; and therefore it appears to me that the strictness of the statute does not apply to such cases as this.

And if the constitution of this burgh of Inverkeith-
 ing is, in fact, such as it is represented in these
 proceedings to be, Black seems to have done no
 more than he was entitled to do: for your Lord-
 ships will observe, that, in order to support this
 action, it should have been alleged that the com-
 plainer was duly elected commissioner by the major
 part of the magistrates and town council; and, in order
 to show that he was thus duly elected, he must have
 stated what was the constitution of the burgh; and
 the act has regard to the constitution of the burghs,
 and proceeds on the supposition that different burghs
 have different constitutions. Why then, if it ought
 to have been alleged and set forth what the con-
 stitution of this burgh was, it must then have ap-
 peared, that every councillor ought to be an inha-
 bitant of the burgh; and then the question would
 have been raised, whether a councillor, by ceasing
 to be an inhabitant, was not, by the constitution of
 this burgh, to be considered as *ipso facto* dismissed
 from his situation of councillor, and whether the
 clerk was not justified in rejecting the votes of persons
 in that situation. That at least is a question which
 still remains to be tried.

Then when it is considered that, with respect to
 county elections, a clear line is drawn by the statute
 for the conduct of the returning officer, and that
 with respect to burgh elections no such line is
 drawn, the interpretation, which the Court below
 has put upon this statute, is one which your Lord-
 ships will be but little inclined to adopt, if it can
 possibly be avoided. It seems to have been the in-
 tention of the legislature, that the acts, which would

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May 16, 1817, subject the clerk to the statutory penalties, should be acts done in breach of his oath. In the section, which relates to the perjury, it is enacted that, "if any person shall presume, *wilfully* and *falsely*, to swear and subscribe any of the oaths required to be taken by this act, and shall thereof be lawfully convicted, he shall incur the pains and punishments of perjury." That leaves it doubtful at least, whether the legislature did not mean that the acts subjecting the clerk to the penalties should be done *wilfully* and *falsely*, which seems necessary in order to constitute the crime of *swearing* wilfully and falsely, that is, corruptly, or meaning to swear that which one knows not to be true. So that it is, at least, doubtful whether the Court below has not put a construction on this statute with respect to the common clerks of burghs which it cannot well bear.

But whether that is so or not, it appears to me, that there is a failure, both of allegation and proof, that the complainer was duly elected commissioner; that what ought to have been averred is not averred; and that if it had been averred, it is not proved; and on that ground, I think, the judgment cannot be sustained.

Judgment of the Court below REVERSED.

POWER OF,
RETURNING
OFFICERS IN
CASES OF
ELECTIONS OF
DELEGATES
FOR BURGH.
—PLEADING.
—EVIDENCE,
&c.

Sect. 39.

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY OF THE GREAT
SESSIONS OF WALES FOR THE COUNTIES OF CAR-
MARTHEN, PEMBROKE, AND CARDIGAN, THE COUNTY
OF THE BOROUGH OF CARMARTHEN, AND TOWN AND
COUNTY OF HAVERFORDWEST.

KENSINGTON (Lord)—*Appellant.*

PHILLIPS (John)—*Respondent.*

AGREEMENT in writing, in 1800, between A. and B. for a lease to B. of a farm belonging to A., for three lives generally, no particular lives being named. C. purchases the farm from A., subject to the agreement, and receives rent from B., who occupied the farm under the agreement till 1808, when B. discontinued the payment of rent, because C., who had not seen the agreement till 1807, then refused to perform it. Bill by B. in 1809, for a specific performance, naming the lives of three of the tenant's children, and decreed accordingly in the Court below; and the decree affirmed in the House of Lords, with some variations respecting the performance of previous conditions by the tenant.

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Lord Eldon, C., observing—"The estate was purchased
"subject to the agreement; and the equity of the case is,
"that the agreement should have been made good at the
"time of the purchase; and though it is objected that the
"naming of the lives now renders the performance a dif-
"ferent thing (which is the case) from what it would have
"been if the lives had been originally named, since
"lives might then have been named, which might have
"dropped by this time, yet it is clear that the parties
"were going on as if the one had been entitled to per-
"formance, and the other had been bound to perform;
"so there seems to have been a mutual default. I have

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“said these few words, because I am anxious that this
“should not be understood as a decision, that under
“such an agreement as this, a party may lay by as long
“as he pleases, and then apply with effect for a specific
“performance. It is only on the particular circum-
“stances of the case, taking it out of a general rule,
“that the decision is founded.”

Notwithstanding the alterations made in the decree, as to the conditions to be performed by the tenant, he was allowed 100*l.* costs, the Appellant not having called for the proper provisions in that respect below; and the tenant having been considerably harassed with expenses, in the course of the suit, and with actions for use and occupation.

Bill filed
1809.

THE bill in this case, filed in the autumn of 1809, by the Respondent, Phillips, against the Appellant, Lord Kensington, in the Court of Chancery of the great sessions for the counties of Carmarthen, Pembroke, &c. stated that, in 1800, Susannah Meares who had then an estate for her life in a farm called Haroldstone in the parish of Haroldstone-west, in the county of Pembroke, with power to grant a lease or leases thereof for three years, agreed to execute a lease for three lives of this farm to Phillips, at the rent at which the same should be valued by Charles Hassall: and the valuation having been made and reduced into writing, the agreement was written at the foot of the valuation in these words: “8th July, 1800, agreed to let the above to John Phillips, on lease for three lives, at the yearly rent of 140*l.*; subject to such allowances, conditions, and restrictions, as to ploughing and otherwise, as shall be advised and directed by Mr. Charles Hassall; the repairs of the farm and premises of Harold-

Agreement
for lease for
three lives,
without
naming the
lives.

“stone-west being first made and completed, pur-
 “suant to the covenant for that purpose contained
 “in the last existing lease thereof.” The agreement
 was signed by George Meares (who was entitled to
 the reversion in fee of the farm) as agent for his
 mother, Susannah Meares, and by the Respondent.
 Phillips, who had previously occupied the farm under
 a lease, which expired in 1800, continued to occupy
 under the agreement, and paid rent to Susannah
 Meares. The mother died in 1802; and the son,
 George Meares, having come into possession, sold
 and conveyed the lands, subject to the agreement,
 to Lord Kensington. Phillips paid the rent to his
 Lordship up to Michaelmas 1808, and then discon-
 tinued the payment, the Appellant having refused
 to perform the agreement, and having given the
 Respondent notice to quit, and brought an eject-
 ment against him: and the bill prayed that Lord
 Kensington might be directed, by decree of the
 Court, to execute to Phillips a lease of the farm for
 the lives of three of his (Phillips’s) children, Eliza-
 beth, Lettice, and Martha; that the covenants might
 be settled and declared, the Plaintiff (Phillips) sub-
 mitting to perform the agreement on his part; and
 for an injunction. Lord Kensington in his answer
 admitted that he purchased, subject to an agreement
 for a lease, but had not seen the agreement in ques-
 tion till 1807; and submitted to the Court, whether
 the agreement was in its nature one of which per-
 formance could be demanded with effect, especially
 after such a lapse of time, without any tender of a
 lease or draft. Witnesses were examined, from
 whose evidence it appeared that some improvements

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Sale subject
to the agree-
ment.

Prayer for
spec. per. spe-
cifying the
lives.

Answer.

Evidence.

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Decree, 27th
August, 1812.

had been made by Phillips on the farm since 1800; and that it was understood by the parties to the agreement, that the lease was to be for the lives of three of the tenant's children.

The Court, on the 27th August, 1812, declared that the Respondent was entitled to a specific performance of the agreement in the said bill mentioned, bearing date the 8th July, 1800; and they ordered and decreed the same to be specifically performed accordingly: and the Respondent by his said bill submitting to perform the said agreement on his part, and upon the Respondent making and completing the repairs of the farms and premises at Harroldstone-west, in the said agreement mentioned, pursuant to the covenant for that purpose contained in the last existing lease thereof, it was ordered, that the Appellant should make and execute to the Respondent a proper lease of the premises comprized in the said agreement, for the joint and several lives of Elizabeth Phillips, Lettice Phillips, and Martha Phillips, in the said bill mentioned, according to the terms of the said agreement: and it was ordered, that such allowances, conditions, and restrictions, as to ploughing and otherwise, respecting the due and proper mode of cultivating the said farm, as should be advised and directed by Mr. Charles Hassall in the said agreement named, should be inserted in the said lease: and it was further ordered, that it should be referred to the Register of the said Court to settle such lease, in case the parties differed about the same: and it was ordered, that the Respondent should execute a counterpart of such lease: and it was further ordered, that it should be referred

to the said register to tax the Respondent his costs of that suit, and that the same, when taxed, should be paid to the Respondent by the Appellant: and it was further ordered, that the injunction granted in that cause should be continued.

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From this decree Lord K. appealed.

Sir S. Romilly and *Mr. Hart* (for the Appellant.) This decree cannot be right; for nothing is more settled than this, that, when a party comes into a Court of Equity for a specific performance, he must show on the face or from the terms of the agreement itself, what the interest is which he claims. The agreement says, "a lease for three lives," but what three lives? It is not more certain than a lease for years without stating the number of years. And this is the more important, as the interest is, in its nature, one which must depend on contingencies. If the lives had been recently named, one of them might have died next day, and none of them might now have been existing. It is essential that the particular lives should appear in the agreement. But then, 2dly, it was not till a lapse of nine years that the Respondent put himself in a situation to incur the risk. *Mears* indeed, in his deposition, says, that the three lives were to be three of the Respondent's children. But suppose this parole (extrinsic) evidence admissible, it left it uncertain which three of the children. The way they argue it is that, in these cases, it is understood that the lessee is to name any lives he thinks proper. But there is no authority for that. The effect of this is to give the tenant a lease for ten years,

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and three lives after ; he, perhaps, naming lives not *in esse* at the time of agreement, or waiting till the dangers of very early life were passed. No case has been found in the least resembling this in its circumstances. But where an estate has been sold at a price to be named by a person who dies before it is named, it has been decided that it is an agreement which cannot be carried into execution. Then the Respondent ought to have made certain repairs as a condition precedent before he could properly claim the lease ; and the Court by its decree impliedly admits that this had not been done, for the decree directs the lease to be granted upon its being done. The Court therefore decides that point in our favour, and yet decrees performance. The Appellant applied to the Court by motion to have the arrears of the 140*l.* rent paid into Court, but without success, though that rent, was at all events payable. And then there was no provision in the decree for payment of the rent, though it is the rule of Courts of Equity to make complete decrees. In these respects the decree is at least materially defective, if not totally wrong.

Mr. Leach and *Mr. Jos. Martin* (for Respondent). Phillips the tenant enters into this executory contract with Mears. Lord Kensington admits in his answer that he had notice of the contract, that he purchased the estate subject to the agreement, that in 1800 he promised a lease accordingly, if it was a good agreement, and that till 1807 he did not know that it was otherwise and that the lives were

not named. Lord Kensington therefore never disputes the contract, and he cannot say that it was waived or abandoned by the tenant, who, as appears in evidence, was expending sums in improvements, which he never would have done, except upon the faith that the contract would be executed. The tenant was paying rent under the agreement, and Lord Kensington, admitting that he had notice of the agreement, must on the principles of equity be presumed to know the contents of it. What then is this legal defect? It is left uncertain, it is said, who is to *name* the lives. But it is not uncertain; for by the principles of law, when the agreement is to give a lease for lives, it is the same as if it were added "to be named by the lessee." The principle is clear. Every deed is to be taken most beneficially for the grantee. Where there is a lease for life, it is for the life of the lessee; and where there is a lease for nine, or seventeen, &c. years, the option is in the lessee. But supposing the contract to be sufficiently certain, they say there was delay. That was the appellant's fault. But suppose it were negligence on both sides; if the Appellant saw the tenant cultivating the ground, as a person would not do unless upon the faith of the contract, he is bound. The delay, it is said, gives the tenant an advantage which otherwise he would not have. True, that is an inconvenience. But why did you not apply to him to name the lives? Even at law, where there is a lease with covenant to pay rent on a certain day, or that the landlord may re-enter, he must make a demand, and that on the day. The Appellant might have relieved himself from the inconve-

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nience ; and if, on demand, the lives had not been named, he would have been discharged. Thus if it were mere negligence. But the Appellant admits that the tenant applied to him for a lease. Then it is objected in point of form that the tenant had no title to sue till he made the repairs. But the Appellant does not deny in his answer that they were made, and at any rate there was no issue on that point, nor any question below about it. Then they say that the Court refused to order payment into Court of the rent of 140*l.* ; and made the payment no term in the decree. But the Court did not think it necessary, the injunction merely preventing the landlord from taking possession, and leaving him free in other respects. To be sure, it would have been a proper term in the decree that the rent should be paid before execution of the lease. But did they ask it? Mears states that it was understood that the lives were to be three of the tenant's children. But he was not bound to name them till demand. (And with reference to the alleged uncertainty of the term as a supposed ground for refusing specific performance—*Clinan v. Cooke*, 1 Scho. Lef. 22.—*O'Herilhy v. Hedges*, 1 Scho. Lef. 123.—*Lindsay v. Lynch*, 2 Scho. Lef. 9. were cited.)

Sir S. Romilly (in reply). The nature of the objection has been misunderstood, for we have no dispute as to who should name the lives, but what the lives were. And in that respect the contract is as uncertain as if it had been a lease for years without mentioning the number. The cases cited depended

on the Irish Tenantry Act, or the principles of equity in Ireland as to these leases before the act, under which renewals were decreed on the terms of paying septennial fines and interest. As to the question of laches, the landlord was not bound to apply to the tenant to name the lives; and, as to the condition precedent, they say that the point was not in issue. But suppose the Defendant had stated in his answer that he did not know whether the repairs were done or not, it was incumbent on the Plaintiff to prove it. But it was in reality denied that the repairs were done, and the decree imports that they were not done. As to the rent in arrear, it was not surprising that the Appellant had not asked that the payment should be made a term of the decree, when the Court had before refused to interfere with respect to the rent. Here is a lease without a period limited. The agreement is to let to Phillips for three lives at a certain rent, and subject to certain conditions as to ploughing, &c. Phillips might then perhaps have the right to name the lives. But as he neglected for so long a time to do so, it is sufficient ground for refusing a specific performance now. It may be said that this may be the subject of reasonable compensation. But, if law refuses that mode of adjustment where there is unreasonable delay, so ought equity. There is no evidence that Phillips tendered any life. And here we are to consider that, if the lives had been named in due time, not one of them might have been in existence at this time. 2dly, The contract is merely conditional, On completing certain repairs, &c. you shall have a lease. Yet there is no evidence that Phillips

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did complete these repairs. That however might perhaps be the subject of compensation, but how could the chances of life be calculated?

Lord Redesdale. This was a bill for specific performance of a contract for a lease. And the decision of the Court below appears to be well founded, that under the particular circumstances of this case the contract should be performed, provided Phillips the tenant had performed his part. The contract is to let for three lives at 140*l.* rent, certain repairs being first made, in terms of a covenant to that effect.

It has been objected that this decree does not provide for putting the premises into a proper state of repair, and that, unless this were done, the contract was not to be performed. So far there is some ground of objection to the form of the decree. Another objection is, that there is no provision for the payment of the rent in arrear. It appears that Lord Kensington has brought actions for rent, and has recovered certain sums, and what he has so recovered must be brought into the account for rent: and I think the decree ought to have made some provision respecting the payment of rent.

I propose then to your Lordships to declare, that under the particular circumstances of this case, Phillips is entitled to a specific performance of the contract, and that the Court below be directed to inquire whether the repairs have been done; for certainly they ought to be done prior to the delivery of the lease: and that, if not already done, in case they should not be done within a reasonable time, to be limited by the Court, the bill be dismissed with his costs to the Appellant; for if Phillips

does not do that, he is not entitled to have the agreement performed: and in case it should appear that this has been already done, that it should be referred to the officer of the Court to inquire what rent was due, and what sums had been paid in respect of rent, and that the account should be carried on till the making of the lease; and that Phillips should pay what was due before he got his lease, so as to provide for that object.

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Then the only further consideration is that of costs. No doubt the Court below was not desired to make these additions, and some costs ought to be allowed. The Respondent has been a good deal harassed, with the expenses of this suit, and with actions for use and occupation; and I propose, therefore, that 100*l.* costs be allowed, which is less than the actual expense.

Lord Eldon (C.) I entirely agree in that proposition under the particular circumstances of this case. The purchase was made subject to the agreement between the tenant and the former owner. The person who was concerned for Lord Kensington in the purchase of the property, knew that there was such an agreement; and I think the law would justify me in saying, that, the tenant being in possession, the purchaser was bound to know the nature of his title, and the demand to which he was subject. Here however it was in fact known, as the estate was purchased subject to the agreement; and the equity of the case, therefore, undoubtedly is, that the agreement should have been made good at the time of the purchase: and though an objection

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is made that the naming the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, as the lives if named at first might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform ; so that, not using the words in any offensive sense, there seems to have been a mutual default here. I have said these few words because I am anxious that this should not be considered or understood as a decision, that, under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of this case, taking it out of a general rule, that the decision is founded. But under these particular circumstances I think the decree, subject to the proposed variations, ought to be affirmed with 100% costs.

Decree *affirmed* accordingly, with alterations as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERT GEORGE STEEL—*Appellant*.

ROBERT STEEL and others—*Respondents*.

June 18, 24, Entail, with restrictions upon the heirs and members of
1817. tailzie. Held by the House of Lords, affirming a deci-

sion of the Court of Session, that the institute was not included in the word *members*, as used in this particular entail; the word appearing to be used in the same sense as the word *heirs*, and the case being therefore within the principle of decision in the Duntreath case.

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ENTAIL.—THE
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NOT BOUND BY
RESTRICTIONS
UPON MEM-
BERS OF TAIL-
ZIE, AS THE
WORD MEM-
BERS IS USED
IN THIS EN-
TAIL.

Entail of Bal-
dastard; 6th
March, 1790.

BY a deed of entail, executed 6th March, 1790, George Steel, of Baldastard, gave, granted, and disposed, with and under the conditions, provisions, and declarations, prohibitive, irritant, and resolute clauses therein inserted, his estate of Baldastard to and in favour of himself in life-rent, for his life-rent use only, and to George Steel his nephew, and Harriet Applin his spouse, in conjunct fee and life-rent, and the heirs whatsoever of the body of the said George Steel in fee; whom failing, to his own nearest heirs and assignees whatsoever; whereby George Steel became disponent or institute under the deed. The procuratory of resignation was granted in terms of the above dispositive clause, but declared to be also “under the conditions, prohibitory “irritant and resolute clauses, powers, and faculties after expressed, and appointed to be inserted “in the charters, saisines, &c. of the foresaid lands “in all time coming, and to be observed *by all my “heirs and substitutes above named.*” The deed then, after providing, *primo*, that, in case the estate should devolve on heirs female, the eldest daughter should succeed without division, proceeded with the prohibitory, irritant, and resolute clauses as follows:

“*Secundo*, That every *person* and heir, whether “male or female, who shall succeed to the foresaid

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BERS IS USED
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TAIL.

Prohibition
against sell-
ing.

“lands, &c. and their heirs and successors what-
“soever, shall immediately upon their succession,
“assume and take, and afterwards bear and carry,
“the surname and arms of Steel of Baldastard:
“*Tertio, That it shall not be leisome or lawful to*
“*any of the said heirs or MEMBERS of tailzie, or*
“their descendants, who shall succeed to his estate,
“to bruick or enjoy the same, or any part thereof,
“by any right or title whatsoever, other than this
“present deed of entail: *Quarto, That it shall not*
“be leisome or lawful to, or in the power of all or
“any of the said heirs, to alter, innovate, or change
“the order of succession above laid down, nor yet
“to do any other act or deed, directly or indirect-
“ly, whereby the same may be any ways innovated
“or changed, nor yet to grant tacks for any space
“longer than nineteen years, nor to accept of any
“tack-duty under the present rental, at least not
“without a regular roup, publicly advertised in the
“Edinburgh newspapers: *Quinto, That it shall*
“*not be in the power of all or any of the said heirs*
“or MEMBERS of tailzie, or their successors, to sell,
“dispone, wadset, or impignorate all or any part
“of the lands or estate before-mentioned, nor to
“grant bonds or infeftments of annual rent or an-
“nuity furth of the same, or any other right, re-
“deemable or irredeemable, which may in any ways
“affect or burden said estate, or any part thereof,
“or to contract debt, or commit treason, nor to do
“any other fact or deed of omission or commission,
“either civil or criminal, whereby the lands and
“estate above-disponed, or any part thereof, may
“anyways be burdened, incumbered, apprised,

"adjudged, affected, evicted, or become caduciary,
 "escheat, or forfeited; nor shall the lands and es-
 "tate aforesaid, or any part thereof, be subject or
 "liable to any debts or deeds, civil or criminal, of
 "all or any of the said heirs of tailzie and substi-
 "tution, or their heirs, contracted or done before
 "or after their succession to the lands and others
 "above-mentioned; *all which debts, acts, and deeds*
 "*are hereby declared void, in so far as they may*
 "*affect all or any part of said estate: Sexto,*
 "That the said George Steel and Harriet Applin,
 "and the whole OTHER heirs and MEMBERS of tailzie
 "above-mentioned, and their heirs and successors
 "who may happen to succeed to the said lands and
 "estate, shall be bound and obliged to pay to Ann
 "Applin, presently residing with me, daughter of
 "William Applin, clerk in the East India House
 "at London, deceased, an yearly annuity of 100/
 "sterling after my decease, at two terms in the
 "year; Whitsunday and Martinmas, by equal por-
 "tions, beginning the first term's payment thereof
 "at the first term of Whitsunday or Martinmas
 "that shall happen after my death and so forth
 "thereafter during her life-time, with a fifth part
 "more of penalty, in case of faillie, and annual
 "rent from each term's payment, till payment of
 "the same; which annuity is hereby declared to be
 "a real burden on the foresaid lands and estate dur-
 "ing the subsistence thereof: *Septimo, That the*
 "*whole heirs and MEMBERS of tailzie above-men-*
 "*tioned, and their heirs and successors who shall*
 "happen to succeed to the said lands and estate,
 "shall become bound, as by their acceptance

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Irritancy.

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BERS OF TAIL-
ZIE, AS THE
WORD MEM-
BERS IS USED
IN THIS EN-
TAIL.

Resolutive
clauses.

“ hereof they become bound and obliged, *to perform*
“ *and observe* EVERY ONE *of the different clauses*
“ *and articles before-mentioned*: declaring always,
“ as it is hereby expressly provided and declared,
“ *That in case all or any of them shall contravene*
“ *and do on the contrary hereof, or of any of the*
“ *conditions, provisions, and obligations before spe-*
“ *cified, or omit and neglect the fulfilling and ob-*
“ *servoing the same, such person or persons so con-*
“ *travening, or omitting and neglecting, shall, im-*
“ *mediately upon such contravention, lose, tyne, and*
“ *amit all right, title, and interest which they have*
“ *or can pretend to by this present deed, and the*
“ succession to the foresaid lands and others shall
“ immediately devolve upon and descend to the next
“ heir-substitute, by this present right, in the same
“ manner, though descended of the contravener’s
“ body, as if they had been naturally dead, or not
“ mentioned herein; and the person so succeeding
“ upon such contravention, may take up their titles
“ to the foresaid lands and others, by declarator,
“ adjudication, or any other manner competent by
“ law, without being liable to the contravenor’s
“ debts or deeds, but subject always to the whole
“ clauses, prohibitory, irritant, and resolutive above-
“ mentioned, &c.” In a subsequent part of the deed
the entailer authorized “ *George Steel and Harriet*
“ *Applin, or any other member of this entail,*” to
apply to the Court to have it recorded.

Entail regis-
tered March
11, 1790.

The entail was registered on the 11th March,
1790, and the entailer died on 24th June, 1790.
On his death, George Steel and Harriet Applin the
conjunct fiars made up titles to the estate; and on

the 24th Nov. 1791, the institute, with the consent of Harriet Applin his wife, executed a trust-deed, whereby he gave, granted, assigned, and disposed the estate to Robert Steel his brother (father of Respondent Robert Steel) and three other persons, upon trust, to sell the same, and dispose of the money in payment of his debts and for other purposes; and he, by the same deed, appointed the trustees guardians to his children. The institute George Steel died on the 15th March, 1792, and the trustees on 25th Sept. 1792, exposed the estate to public sale at the upset price of 7000*l*. No offer was made at the auction; a circumstance ascribed by the Appellant (eldest son of the institute) to the generally received opinion that the title was defective, so that a public auction could afford no fair criterion of value. The estate was afterwards purchased, at the upset price, by private bargain, in trust for Robert Steel, one of the trustees to sell, and a guardian to the Appellant, who was then a minor. Robert Steel possessed till his death, and then it devolved on his eldest son Robert Steel the Respondent, who, in 1806, sold it to Robert Clark, writer in Perth, who again sold it to George Greenlaw, writer to the signet.

Robert George Steel, the son of the institute, after all these sales had taken place, raised an action of declarator of irritancy and reduction against the eldest son of the original purchaser, and against the subsequent purchasers, and surviving trustees, concluding to have it found and declared that the institute and his wife, by executing the trust-deed, had for-

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BERS IS USED
IN THIS EN-
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Institute ex-
ecutes a trust-
deed to sell
the estate.

Sale in trust
for Robert
Steel, one of
the trustees.

Subsequent
sales.

Action to set
aside the sales.

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BERS IS USED
IN THIS EN-
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Interlocutors,
July 6, Nov.
12, Dec. 3,
1813; Jan. 14,
1814.

Vide the in-
terlocutor at
length in the
Lord Chancel-
lor's speech,
post.

feited all right to the estate, and that it now be-
longed to the pursuer; and concluding also for re-
duction of the trust-deed, and subsequent transmis-
sions of the estate. Memorials on the merits having
been ordered and given in, the Lord Ordinary pro-
nounced an interlocutor, to which the Court ad-
hered, finding that the prohibitions in the entail
were not applicable to the institute or disponent, and
assoilzied the defenders, and decerned. From this
judgment the pursuer appealed.

The question was, whether the word *members*,
as used in the restrictive clauses of this entail, did
or did not comprehend the institute.

For the Appellant, it was argued that in the Dun-
treath case the House of Lords had determined that
the institute or disponent was not included in the
term *heir*, which technically implied in law the per-
son who takes by service, as distinguished from the
institute or *fiar* who takes by the dispositive part of
the deed. But here there was an essential distinc-
tion, because the prohibitory, irritant, and resolute
clauses were laid, not merely on the heirs, but also
on the *members* of tailzie; and in order to bring
this case within the principle of the Duntreath case,
it would be necessary to show that the term *heir* and
member were in law co-extensive and synonymous.
The contrary however was clear from the language
of conveyancers and the best institutional writers,
by whom the term *member* was used as including,
or applying to, the institute. That it was so used
by conveyancers appeared from the entails of Castle-
hill, recorded 29th June, 1711; Dumbarnie, 2d

July, 1712; Robroystown, 21st July, 1725; Glook, June 18, 24, 27th January, 1731; Skelmorlie, 12th July, 1704; Tushielaw, 22d Jan. 1715; Lamington, 30th July, 1726, and others; and that it was so used by institutional writers appeared from the marginal note or title to the case of *Erskine v. Balfour Hay*, which is in these words "The *first member* of an entail "being a disponee is not bound by the restrictions "laid on the heirs of entail," and this title being transcribed into the dictionary was sanctioned by the authority of Lord Kames. The authority of Sir G. Mackenzie was still more decisive; for he expressly laid down that the term *member* was a technical generic term, including the institute as well as the heir. His words were "The proprietor "tailzie his lands in Scotland in favour of a certain "person who is called the institute or *first member* "of tailzie; whom failing, to the rest that are "called substitutes. Institutes and substitutes being "terms borrowed from the civil law, and expressed "by us in the *first*, second, and third *member* of "tailzie." It had been contended that in this entail the word *members* was a redundancy, and that the entailer meant no more by it than he did by the word *heirs*. But it was manifestly the entailer's intention that the institute should be bound by the fetters, and the question was whether, though the word *heirs* was not sufficient, the word *members* was not large enough to comprise the institute. It was true the word *members* was employed in a passage of the Duntreath entail; but the reason why it had not there the effect of extending the restriction to the institute was, that the only clause in which

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the term occurred was one by which the efficacy of the entail could not be protected; the prohibitory irritant and resolute clauses being there directed solely against the *heirs*. But the present case was exactly the reverse; for though in some unimportant passages the word *member* was omitted, yet the prohibitory, irritant, and resolute clauses against selling, &c. applied to the *members* as well as heirs. The irritancy at the end of the fifth clause clearly applied not merely to the member of the sentence immediately preceding, but to the whole; and by the seventh or resolute clause the whole heirs and *members* were bound to observe *every one* of the clauses and articles before-mentioned, or to forfeit the right in case of contravention. It had been objected also that the restriction, in the third clause, was directed against "*members, &c. who shall suc-ceed &c.*" and that the institute was not a successor. But *succeed* applied to purchase as well as to descent, *ex gratia*, a singular successor. The only clause in which the restriction was directed against *heirs* only was that (the fourth) against altering the order of succession, which was not here in question; and by the seventh clause the whole heirs and *members* were bound to observe *every one* of the clauses and articles before-mentioned. In *Syme v. Dixon*, 1809, it was held that a resolute clause extended to the institute under the words *person or persons*: and fetters might be raised (in a way quite different from implication) by reference, as in the cases of *Lawrie v. Spalding*, 1764, and others. In the sixth clause the institute was particularly named; but the use of the word "other" there

showed that the entailer (if the intention were to be considered) understood him to be included in the general expression "*heirs and members*." Here too the conditions and limitations came before the grant to the institute, and it was not so in the Duntreath case.

For the Respondents it was argued that the estate was sold twenty-five years ago by the institute without objection, under the opinion of the most eminent counsel. The principle was established in three cases before the Duntreath case, and in that case the Court of Session seemed to recede; but the House of Lords set it up again, and that was followed by seven cases decided on the same principle, which was now inflexible. The question was, not whether the entailer intended to include the institute, but whether he had expressly included him. The first point they insisted upon was that the word *member* strictly included the institute. Though that were made out, it would not be sufficient, for the word was not used in the irritant clause, and as this was a question between heirs, the strictest construction must be applied. Not one of the authorities mentioned, except the marginal note or title to the case of *Erskine v. Hay*, showed that the word *members* meant any thing further than the heirs of the entail. For the question still remained whether the institute was a member of entail. The entails referred to by them made the institute a member by including him expressly by name in the entail, or the same question might have arisen upon them as on this entail. Mackenzie spoke of the institute as the first member of entail, but that meant only that

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Ross (case of)
1742. Leslie,
(case of) 1752.
Erskine v.
Balfour, Hay,
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Duntreath
case, Dec. 24,
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he was the first member, if so nominated. That observation did not apply to the note in *Erskine v. Hay*; but in the case itself there was no such expression as first member of entail, and the note was no good authority. There was no substantial distinction between this and the Duntreath case, unless it could be made out that there was a substantial difference between the words "I dispone, under condition, to A. B.," and "I dispone to A. B. under condition." Then followed the cases of Gordonstown, Wellwood, Marchioness of Titchfield, *Miller v. Scott*, *Menzies v. Menzies*, &c. Besides, there were parts of this entail from which it appeared that the entailer understood the institute in a sense different from that of heirs or members, as in the passage where he speaks of heirs or members who shall succeed, &c.; for though in a general sense *succeed* may apply to a purchaser or institute, yet technically it means one who is to inherit. Besides, in this entail, the irritant clause (sect. 5) must be confined to the last member of this long sentence. Still there was reason to believe that the entailer considered the institute as included; but the rule was clear, plain, and positive, that he must be expressly mentioned.

Mr. Leach (in reply). The Duntreath case was clear law, but the judgment of the House of Lords there was that the institute was not bound under the word heir. (*Lord Eldon*, C. The difficulty with me is how, if the institute was not comprised under the word *heir*, he could be fettered at all.) True, but it was there held that *heir* meant a person taking

by service and not as disponee. But what is the meaning of the term *member*? That had not been the subject of judicial controversy, and the works of lawyers and conveyancers on this subject were the best possible source of information; and when the Respondents said that these were no authority, they left the word without any meaning at all. But from the works of institutional writers and conveyancers it appeared that the word *member* applied to the institute not in a popular sense, but in legal technical language. The institute then being included in the word *members*, the prohibitory, irritant, and resolute clauses applied to him as well as to the other members, and the cases cited on the other side had no application to the present case.

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Mr. Leach and *Mr. Brougham* for the Appellants; *Sir S. Romilly* and *Mr. Adam* for the Respondent.

Lord Eldon (C.) As to the particular circumstance here that the purchase was made in trust for one of the trustees to sell, that is not made a ground of proceeding in this cause, and I give no opinion upon the case in that view of it: and then the question depends solely on the entail.

Judgment.
June 27, 1817.
Trustee to sell.

The *Duntreath* case has settled the point that entails are *strictissimi juris*, and that, whatever the intention of an entailor may be, fetters are not to be imposed by implication: and it is to be lamented that, after that point had been so settled in the *Duntreath* and other cases, a deed of entail, framed in 1790, should still have been made so as to leave

Duntreath
case.

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The ground of
decision in the
Duntreath
case not now
to be shaken.

Not to be got
rid of by nice,
thin, and sha-
dowly distinc-
tions.

the matter in this situation, that, although a doubt can hardly be entertained that the entailer intended to include the institute or disponee, the intent has not been clearly and unequivocally expressed.

With respect to that case of Duntreath I have only two observations to make: 1st, that I was not a little startled at that decision; and, 2dly, that the decision having been once made, it must not now be shaken. But it is a very remarkable circumstance that in the Entail Act, 1685, there is no word under which the institute can be fettered at all, unless under the words *heirs* of tailzie; and yet it has been decided that if you fether the *heir* only, in the prohibitory, irritant, and resolute clauses; if in any of these clauses the word *heir* only is mentioned, the institute is not included in the fetters of the entail: and the question now is, whether the institute is fettered as a *member* of tailzie.

Now after it has been so often decided that the institute or disponee cannot be fettered by implication, that principle having been once solemnly settled, it ought not now to be got rid of by nice, thin, and shadowy distinctions. Having regard then to that principle, and to what, as Lord Kenyon expressed it, is to be found within the four corners of the instrument; we are to consider whether, if the entailer intended to fether the institute, he has clearly and unequivocally expressed that intention.

The interlocutor of the Lord Ordinary was this:—
“The Lord Ordinary having considered the memorial for Robert George Steel, pursuer, with the counter-memorial for Robert Steel and other defenders, and whole particulars, finds, 1st, that,

“ in 1790, George Steel disposed his lands, of June 27,
 “ Baldastard, to and in favour of himself in life- 1817.
 “ rent, for his life-rent use only; and to George
 “ Steel his nephew, and Harriet Applin his spouse,
 “ in conjunct fee and life-rent, &c. whereby the said
 “ George Steel, jun. became disponee or institute
 “ under the said deed: 2d, finds, that the procura-
 “ tory of resignation was granted in terms agree-
 “ ably to the above dispositive clause; but declared
 “ to be also under the conditions, provisions, &c.
 “ which are appointed to be inserted in the charters,
 “ sasines, &c. of the foresaid lands, in all time
 “ coming, and to be observed by all my *heirs and*
 “ *substitutes* above named, &c.

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There your Lordships observe, the words are—
 “ *all my heirs and substitutes*,” and though I do not
 say that an institute may not be included in the
 word *members* of tailzie; yet it must be clear that
 the entailer so intended it; and there he uses the
 words “ *heirs and substitutes*,” which has a ten-
 dency to show that he had in view, in this instru-
 ment, his heirs and substitutes only. “ 3dly, finds;
 “ that, by the fifth clause of the entail, it is de-
 “ clared, that it shall not be in the power of all or
 “ any of the said heirs, or members of tailzie, or
 “ other successors, to sell, dispone, wadset, &c. and
 “ the irritant clause, following this prohibitory clause,
 “ is directed against all debts, acts, and deeds of all
 “ or any of the said heirs of tailzie and substitu-
 “ tion, or their heirs.” Now it was very ably con-
 tended at the bar, and in a manner which might
 carry conviction to my mind, if I had not been
 obliged to guard it by the rules of law, and to give

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a *judicial* opinion, that the entailor meant that these prohibitions should extend not merely to the substitutes, but also to the institute: but I cannot in this instance apply that construction; for when the entailor says, "that it shall not be in the power of all or " any of the *said* heirs or members of tailzie, &c." he seems to give the construction which he intended should be put upon these words, by the words which he uses in the previous part of the deed. "4thly, " finds that in the sixth clause of the entail, where " an annuity is granted to Ann Applin, the afore- " said George Steel, and Harriet Applin his spouse, " is contradistinguished to the other heirs and mem- " bers of tailzie." There George Steel is named in contradistinction to other heirs and members; and as to the word *other*, that form of expression occurred and was argued upon in the Duntreath case: but the argument did not there prevail. "5thly, finds, " that under these circumstances the expressions in " the entail, of 'heirs or members,' and of 'heirs and " 'members' of tailzie, cannot be held to apply to " George Steel the disponent or institute; but that " the expressions 'heirs or members,' or 'heirs " 'and members,' must be held as synonymous " terms," (that is, with *heirs and substitutes* mentioned in the first part of the deed); "and there- " fore, that in consequence of the principles ac- " knowledged in the cases of Duntreath and Well- " wood, and other decisions of the Court, the pro- " hibition against selling or executing other deeds, " contained in the foresaid entail, cannot be held " as applicable to the said George Steel as institute " or disponent, &c."

Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result. I propose therefore to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and advertg also to the whole of the circumstances as they appear in this instrument (I am anxious to have these words introduced), the word *members*, as used in this deed, does not include the institute—and that the judgment should be affirmed.

Judgment **AFFIRMED**.

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MEMBERS IS
USED IN THIS
ENTAIL.

The word
members (of
entail), as
used in this
deed, does not
include the
institute.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

RITCHIE—*Appellant*.

MAGISTRATES OF CANONGATE and }
others } *Respondents*.

THE magistrates of Canongate, upon a certificate on oath by a physician, that the life of a debtor, confined in their gaol by the Appellant, was in imminent danger, permitted his liberation from the gaol to some house within the burgh, on his giving bonds with two sureties to conform to the conditions of the act of sederunt, 1671, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same, and returning to prison on recovery of his health, or when required, under penalty of paying the debt. A parti-

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cular house within the burgh was assigned for the residence of the debtor; but he never was there, and was frequently seen at his house in Surgeons' Square and other places without the burgh, apparently in good health. The Appellant commenced an action against the magistrates for the debt, on the ground that the debtor's residing out of the jurisdiction of the burgh of Canongate was an escape, which made the magistrates liable. The Court below decided in favour of the magistrates; and this decision was affirmed in the House of Lords, both on the general ground that the circumstances were not such as rendered the magistrates liable under the act of sederunt, and also upon certain specialties in this case.

The Lord Chancellor stating, that he would have had some difficulty in saying that the magistrates were not liable on the general ground, if the construction, as to this point, to be put on the act, had not been, in some measure, settled by the decisions in the cases of *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen* in 1792.

Debtor imprisoned.

Petition for
liberation
under Act of
Sederunt,
1671.

THE material facts of this case were these:—on the 6th July, 1808, Wight was imprisoned for debt (300*l.*) in the Canongate gaol by Ritchie, and after the lapse of the requisite time, Wight commenced a process of *cessio bonorum* against his creditors. This was opposed; and Wight, after being confined about five months, on the 13th Dec. 1808, presented a petition to the baillies of Canongate to be liberated under the act of sederunt, 1671, which was accompanied by a certificate from a physician, that the life of the prisoner was in imminent danger from the confinement. The physician having sworn to the truth of the certificate, copies of the petition and deposition were served upon Mr. Ritchie; and, no answer or objection having been made, the magistrates, on the 15th Dec. 1808, pronounced an

interlocutor of liberation in the usual form, viz. : June 27,
 " The baillies having considered this petition, with 1817.
 " the deposition of the physician and execution of
 " service, admit protestation against the aforesaid
 " Mr. Alexander Ritchie, writer to the signet, for
 " non-appearance, and answering the same. In
 " respect of the physician's deposition, grant warrant
 " to the keepers of the tolbooth of Canongate to
 " permit the petitioner's liberation therefrom, to
 " some house within the burgh, for the recovery of
 " his health, pursuant to the act of sederunt, 14th
 " June, 1671, on his lodging with the clerk a bond
 " to restrict and conform himself agreeably to the
 " conditions and limitations of the said act, and to
 " return to prison on the recovery of his health,
 " or when required, under penalty of payment of
 " the debt for which he is detained in prison, as
 " also to indemnify and freely keep the burgh and
 " magistrates, of all damages, costs, or expenses,
 " whatever, anent the premises."

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Dec. 15, 1808.
Interlocutor
of liberation
by the baillies
of Canongate.

Of the same date, a bond of caution was granted
 by Archibald Wight, and by John Craw, writer to
 the signet, and John M'Tavish, writer in Edin-
 burgh, as his sureties. After reciting the aforesaid
 petition, the deposition of Dr. Mitchell, and the
 interlocutor of the magistrates, the bond proceeds
 thus : " We the said John Craw and John M'Tavish
 " judicially enact, bind, and oblige ourselves and
 " our heirs, jointly and severally, in the burgh court
 " books of Canongate enacted, that the said Archi-
 " bald Wight shall, during his temporary release-
 " ment for the recovery of his health, restrict and
 " conform himself agreeably to the terms and con-

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"ditions of the said act of sederunt, by residing in
"some house within the burgh, and on no account
"going beyond the jurisdiction of the same; and
"immediately on recovery of his health, or when
"required, shall return to and surrender himself
"prisoner within the said tolbooth, under the
"penalty of forfeiting and paying the debts for
"which he stands imprisoned and arrested, amount-
"ing to sums between two and three hundred
"pounds sterling money; as also to indemnify, free
"and harmless keep, the magistrates and burgh of
"Canongate, of all costs, damages, or expenses
"whatsoever, in, by, through, or anent the pre-
"mises: and the said Archibald Wight enacts and
"binds himself and his heirs, not only duly to per-
"form the premises on his part, by a strict observ-
"ance of the conditions and limitations of the said
"act of sederunt, and returning to prison upon re-
"convalescence, but also to relieve and freely keep
"his said sureties, and their foresaids, of all loss
"and damage whatever in the premises: and all
"and each of us do hereby subject ourselves to the
"jurisdiction of the Canongate, and nominate the
"court-house thereof as a domicile whereat either
"of us (being for the time resident without the said
"jurisdiction) may be legally summoned and
"charged to the performance of the premises or any
"part thereof."

Dec. 24. 1808.
Interlocutor,
finding the

Wight was accordingly liberated without objec-
tion; and ten days after this liberation, viz. on
24th Dec. 1808, he was found entitled to the benefit
of the process of *cessio bonorum* by interlocutor of
the Court of session. On the 19th of January,

1809, Mr. Ritchie applied by his agent, Mr. Grant, and obtained a copy of the bond of caution granted by Mr. Wight and his sureties to the magistrates, on his liberation. When this copy was furnished, the assistant clerk of the Court of Canongate, who is keeper of the prison records, desired Mr. Grant to say, "whether he wished Mr. Wight to be returned to prison;" and told him that a memorial was ready to be presented to counsel for advice on the part of the magistrates. Mr. Grant in reply desired that nothing might be done till he gave notice, and declared that he, on the other hand, would take no step without giving previous notice to the magistrates.

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debtor entitled
to the benefit
of *cessio*.

In Feb. 1809, Mr. Ritchie, having borrowed the caption from the Canongate gaol, reclaimed against the interlocutor in the process of *cessio bonorum*; and ultimately the *cessio* was refused, both by the Court of Session and House of Lords; and on the 8th of May, 1809, intimated to the magistrates of Canongate, under the form of a protest, that they had suffered Wight to escape, and were liable in payment of the debt. On the 12th May, Wight surrendered himself, but was not then received, the gaoler not thinking that he had power to receive him without having the caption in his possession. On the 13th May, Mr. Ritchie returned the caption, and Wight was re-incarcerated; but on the 24th May, 1809, he was again liberated in terms of the act of sederunt.

Feb. 1809.
Interlocutor
reclaimed
against.

In the mean time Mr. Ritchie, on the 10th May, 1809, raised an action against the magistrates, set forth in the summons, "that by an act of

10th May,
1809. Action
against the
magistrates.

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1671.

“ sederunt of the Lords of Council and Session,
“ dated 14th June, 1671, it is enacted, that hereafter
“ it shall not be lawful to the magistrates of burghs,
“ upon any occasion whatsoever, without a warrant
“ from His Majesty’s Privy Council, or the Lords
“ of Session, to permit any person incarcerated in
“ their tolbooth for debt, to go out of prison, except
“ only in the case of *parties sickness*, and *extreme*
“ *danger of life*, the same being always attested
“ upon oath under the hand of a physician, chirur-
“ geon, apothecary, or minister of the gospel in
“ the place; which certificate shall be recorded in
“ the town court books; and in that case, that the
“ magistrates allowed the party only liberty to re-
“ side in some house within the town during the
“ continuance of his sickness, they being always an-
“ swerable *that the party escape not*, and upon his
“ recovery to return to prison: and the Lords de-
“ clare, that any magistrates of burghs, who shall
“ contravene the premises, shall be liable in pay-
“ ment of the debt for which the rebel was incar-
“ cerate. That notwithstanding the said Archibald
“ Wight was so incarcerated in manner foresaid, yet
“ true it is and of verity, that George Rae, fish-
“ hook-maker, Canongate, and Joseph Brown, baker
“ there, baillies of the said burgh thereof, the Right
“ Honourable William Coulter, Lord Provost of the
“ city of Edinburgh, Peter Hill, John Turnbull,
“ Archibald Campbell younger, and Alexander
“ Manners, Esq. baillies of the said burgh, suffered
“ the said Archibald Wight to escape out of prison,
“ without payment of the debt above specified, or
“ a charge to set at liberty to that effect; and that

“ the said Archibald Wight has accordingly, for
 “ many months past, being going at liberty in per-
 “ fect health, and residing without the jurisdiction
 “ of the burgh of Canongate; whereby the said
 “ magistrates, not only as magistrates, but also they
 “ themselves personally, and their heirs and repre-
 “ sentatives, and also their successors in office, are
 “ liable to the said Alexander Ritchie in payment
 “ of said debt, interest, and expenses.

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IN CASES OF
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OF DEBTORS
UNDER ACT
OF SEVERUM,
1671.

And concluding, “ that it ought and should be
 “ found and declared by decret of the Lords of
 “ Council and Session that the said defenders (Re-
 “ spondents) suffered the said Archibald Wight to
 “ escape out of prison, at least permitted him to go
 “ out, without payment of the foresaid debt, or a
 “ charge to set at liberty, and the same being so
 “ found and declared, the said defenders not only
 “ as magistrates, but as individuals, and their suc-
 “ cessors in office, ought and should be decerned
 “ and ordained, conjunctly and severally, to make
 “ payment to the pursuer (Appellant) of the foresaid
 “ principal sums and interest since due and till pay-
 “ ment, &c.”

The truth of the allegations in the summons being
 denied by the magistrates, the Lord Ordinary, on
 the 8th July, 1809, ordered the pursuer to give in
 a condescendence of the facts, which he averred
 and offered to prove in support of his action; and
 the following condescendence was accordingly given
 in.

“ 1st. That Archibald Wight, late starch manufac-
 “ turer at Ormiston, was incarcerated at the instance
 “ of the pursuer (Appellant) within the tolbooth of

The Appel-
lant's conde-
scendence.

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“ Canongate, in virtue of a legal diligence, for pay-
“ ment of the debt mentioned in the libel, upon
“ the 6th July, 1808.

“ 2d. That the defenders (Respondents) allowed
“ the said Archibald Wight, contrary to law, and
“ to the act of sederunt relative to the custody of
“ prisoners, to go out of gaol without payment of
“ the debts for which he was so imprisoned, as is
“ specifically stated in a protest against the de-
“ fenders, produced in process and here referred to.

“ 3d. That the said Archibald Wight has ac-
“ cordingly for many months past been going at
“ perfect liberty, residing without the jurisdiction
“ of the burgh of Canongate, and has never slept
“ one night in the house appointed for his residence
“ within the jurisdiction of the Canongate.

“ 4th. That the said Archibald Wight has been
“ seen at Portobello, Leith, and other places without
“ the said jurisdiction, in apparently good health:
“ and,

“ 5th. That upon many days the said Archibald
“ Wight was out of the jurisdiction of the magis-
“ trates of Canongate ; and particularly upon Satur-
“ day last, the 16th Dec. 1809, the said Archibald
“ Wight was seen in the Parliament House attend-
“ ing at the bar of the inner house, instructing
“ counsel at the advising of his process of *cessio*
“ *bonorum*.”

The Lord Ordinary, on the 6th Feb. 1810, al-
lowed both parties a proof, and witnesses were ex-
amined on the part of the pursuer.

Evidence.

Mrs. Greig, in whose house a room had been taken
for Wight's residence, deponed, “ That she knows Ar-

"chibald Wight, and that there was a room taken
 "for him by a woman from the Canongate jail,
 "where he was then incarcerated, in the deponent's
 "house: that Wight *never took possession, nor ever*
 "*was in the room taken for him*: that the room was
 "kept open for him for five or six weeks: that
 "about three weeks after the room was taken for
 "him, the deponent went to the gaol, where she
 "was informed he was to be that evening, and en-
 "quired of him whether or not he meant to keep
 "the room? and why he did not take possession?
 "to which Wight replied, that it was no business
 "of hers whether he possessed it or not; that she
 "would be paid her rent, and that genteelly: that
 "she has never, to this day, received a sixpence for
 "the rent: that she recollects of waiting again upon
 "Wight at his own house in Surgeons' Square, upon
 "two different occasions: that upon the first of
 "these she did not see Wight: that upon the se-
 "cond she went between nine and ten in the morn-
 "ing, and *found him in bed*: that she got nothing
 "from him, and that she cannot specify at what
 "time these meetings took place, but they were
 "within six months subsequent to the time the
 "room was taken for him."

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John Gow, painter, "recollects dining with Mr.
 "Wight after his liberation, and, as he thinks, very
 "early in the month of January, 1809: that Mr.
 "Wight then received the deponent at dinner in
 "his own house, in Surgeons' Square; but whether
 "Mr. Wight at that time slept there or not the
 "deponent cannot say: that, to the best of his re-
 "collection, he left Mr. Wight's house between

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" eight and nine o'clock that evening, and that Mr.
" Wight was then in his own house : that in spring,
" 1809, he recollects of being in company with
" Mr. Wight in a house at the back of the Fountain
" Well : that this might be in the month of March,
" or thereabouts."

Margaret Turnbull depones, " That she recol-
" lects seeing Wight in Surgeons' Square after the
" time he was imprisoned, and that she cannot pre-
" cisely say, whether it was before or after Christmas
" that she saw Mr. Wight as above, but that she
" saw him often." And James and Walter Lock-
hart stated the same circumstance.

The Reverend Joseph Robertson depones, " That
" upon two occasions subsequent to Wight's libera-
" tion on the bill of health, the deponent was in
" company with him at Morris's tavern, opposite to
" or at the back of the Fountain Well : that upon the
" first of these occasions, the deponent left Wight
" in Morris's : that upon the second they came away
" together, when Wight told the deponent that he
" was going home to his own house in Surgeons'
" Square ; and parted from him with that intention :
" that upon another occasion, also subsequent to
" Wight's liberation, the deponent met him coming
" down a small close near the foot of the Cowgate, as
" from Surgeons' Square : that he knows Wight to
" have been a second time incarcerated, but that
" these meetings all took place prior to his second
" incarceration ; and that the two meetings at
" Morris's happened very soon after his liberation
" upon the bill of health : that all these times
" Wight appeared to the deponent to be in good

“health:” and that upon another occasion, the date of which he did not specify, he “met Wight at the foot of the Canongate, opposite to the Abbey, who then told him that he had been at Leith the preceding day; and that if the deponent would accompany him there at that time he would give him a bottle of wine; which invitation the deponent declined, and he did not see Wight at that time leave the Canongate.”

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John M'Gregor depones, “That he recollects having met Wight in the High School Wynd, after a liberation which he obtained upon a bill of health, and prior to his second incarceration: that he met him several times in Surgeons' Square, also previous to his second incarceration: that he recollects of meeting Wight in company with Mr. Pattison, near St. Leonard's Hill, also previous to the second incarceration.”

Hamilton Robertson depones to his recollection of meeting Wight “on two occasions after his liberation, once opposite the Fountain Well, and once upon the South Bridge, and of remarking that he was then beyond the bounds.” But adds, that he cannot say how long this was after his liberation.

It was not disputed that Surgeons' Square, the Fountain Well, and South Bridge, were without the particular jurisdiction of the Canongate: but it was remarked that the evidence was defective as to dates, and that for any thing that appeared it might apply to the period between the date of the interlocutor in the *cessio*, and the reclamation.

The Magistrates gave in evidence the written pro-

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Judgment be-
low for the
magistrates.

Appeal.

Reasons for
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Stair's Inst.
B. 4. T. 47.
S. 29.

ceedings respecting Wight's liberation, the protest against them, and several documents relative to Wight's *cessio bonorum*, in order to show that Wight's health, after his surrender, was such as rendered it necessary again to liberate him. The borrowing of the caption, by Ritchie, in February, and the other facts, as above stated, were proved by these writings, or were admitted by the Pursuer.

The cause having come before the Lords of the first division, the Court, on the 6th July, 1812, sustained the defences, assoilzied the defenders, and decerned, and found the pursuer liable in expenses; and, after advising a reclaiming petition with answers, they adhered to this interlocutor. From this judgment the pursuer appealed.

The REASONS of Appeal, given in the Appellant's case, were these:

All the authorities of the law of Scotland are agreed, that a debtor, liberated from prison on account of sickness, remains under the custody of the magistrates; and they are responsible for his custody during that time, and must have him guarded.

Lord Stair, in his Institute of the Law of Scotland, says, "It will not be a relevant defence, or reason of suspension, for magistrates suffering prisoners to escape, that they will yet take the party, albeit he be in as good condition as when he escaped, or that upon testificates of physicians they suffered the prisoner, for his health, to go out to take the air, or to go to a private house; albeit in either case there were two to guard him; for the Lords, by act of sederunt, June 14, 1671,

“ prohibited the magistrates of Edinburgh to suffer
 “ prisoners to go out without particular warrant, or
 “ the magistrates of other burghs, not far distant, ex-
 “ cept in the imminency of death. And where such
 “ warrant is granted, the magistrates *ought to*
 “ *choose the place of the prisoner's abode, that the*
 “ *same be secure, and guards attending.* Like as,
 “ they do declare, that if magistrates let prisoners
 “ go out upon any other pretence, although they
 “ restore them to prison, they shall be liable for the
 “ debt; for *squalor carceris* is an interest of the
 “ creditor to cause the debtor to satisfy or to dis-
 “ cover his means, which magistrates ought not to
 “ prejudge them in.”

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Bankton,
B. 1. S. 10.
s. 198, 202.
Erkine, B. 4,
T. 3. s. 14.

That this was the law of Scotland before the act of sederunt, 1671, appears from various decisions of the Court before the act was passed.

The following cases are reported by Haddington and Gosford before the year 1671.—“ A magistrate
 “ setting at liberty a party incarcerated for debt, will
 “ not evite payment thereof by re-entering him to
 “ prison; because the incarceration is a kind of pu-
 “ nishment of his rebellion, and presumeable that
 “ thereby he might have been induced to make pay-
 “ ment if he had not been eased by being set at
 “ liberty.”—“ A person in prison being sick, and
 “ having the same attested under the hand of a
 “ doctor of medicine, was allowed to be transported
 “ to a house in the town, upon caution, to be a true
 “ prisoner there, and to return to prison upon re-
 “ covery.”—“ A magistrate suffering a prisoner for
 “ debt to lie out of the tolbooth, though he was in

Dict. vol. 2.
p. 169. Had-
dington, July
23, 1605.
Nisbet v.
Drummond.

Ibid. Dec.
1609, Lord
Applegirth
supplicant.
Gosford, July
14, 1668.
Paplay v. Ma-
gistrates of
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“ *extremis agens*, and died, was found liable for
“ the debt, seeing he ought to have had a warrant
“ from the Lords for that effect. Here it was
“ proved, that formerly they had suffered him to lie
“ several nights out of prison.”

The act of sederunt therefore declared the law,
and was intended to put magistrates of burghs
against undue laxity in the custody of debtors.

Town of Bre-
chin v. Town
of Dundee,
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This appears from the act of sederunt itself, and
the decision of the Court in a case which occurred
at that time, reported by Lord Stair and Lord Gos-
ford, and thus abridged by Lord Kaim: “ Ma-
“ gistrates of a town being pursued for allowing
“ their prisoner to go abroad frequently out of their
“ tolbooth into the street and taverns, it was found
“ no relevant defence that the prisoner was always
“ guarded; for the Lords were of opinion, that ma-
“ gistrates of burghs have only power to let pri-
“ soners come out of their tolbooth, under a guard,
“ in the extreme hazard of their life by sickness,
“ and not without testificates by physicians, or
“ skilled persons, upon oath, bearing the party’s
“ condition to require the same, and that without
“ great hazard, they could not suffer delay to make
“ application to the Council or Session.”

The principles laid down by Lord Stair and other
authorities on the law of Scotland, have been en-
forced by the Court in various cases: *Fullarton and*
Kennedy against Magistrates of Ayr, 7th March,
1781; *Shortbread against Magistrates of Annan*,
8th June, 1790; *Gray against Magistrates of Dum-*
fries, 7th December, 1780; *Purdie, &c. against*

Magistrates of Montrose, 29th June, 1786; *Wilson against Magistrates of Edinburgh*, 8th July, 1788.

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It is clear that, in point of fact, Wight was under no custody or restraint. He never went to the lodging appointed for him, and does not appear to have been within the jurisdiction of the Canongate, unless when he visited the jail for his own amusement.

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OBJECTION 1st.—That Wight's application on account of sickness was intimated to the Appellant; and he did not oppose it, or insist on a guard.

Answer 1st.—The custody of a debtor is with the Magistrates, not with the creditor; and as the Appellant gave no consent to his liberation, the responsibility remained with them.

Answer 2d.—The Magistrates transferred the debtor to a lodging within their jurisdiction; the creditor had therefore a right to expect that he should be confined in that lodging, and not allowed to go at large, and reside beyond the jurisdiction.

OBJECTION 2d.—That prisoners who are sick will not be benefited by being removed from prison, unless they are allowed to use exercise, and go freely about.

Answer 1st.—This doctrine (which is not that of the law of Scotland) would put it in the power of magistrates with the assistance of false certificates, to put an end to imprisonment for debt altogether, under pretext of sickness.

Answer 2d.—Supposing, but not admitting, that in certain cases on cause specially shown, prisoners may be allowed to take exercise for recovery of their health, there must in that case be a guard, and the

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Case for the
magistrates.

Decisions on
the point now
in question.
Forbes v. Ma-
gistrates of
Canongate,
Jan 31, 1798,
not reported.

debtor must not exceed the precise limits appointed for that purpose, and necessary for his health.

Answer 3d.—Wight did not take exercise for recovery of his health; but went to taverns, and resided in his own house, beyond the jurisdiction of the magistrates.

In the case for the Respondents, two cases, those of Forbes and Fordyce, were stated, upon which the Respondents particularly relied; and, as these cases were not reported, the statement is here transcribed at length, together with the observations on the cases cited for the Appellant.

Alexander Robertson, a prisoner for debt, in January, 1790, applied for liberation, producing merely a certificate, on soul and conscience, by Mr. James Arrot, surgeon, and Dr. Henry Cullen, physician, that, for the preservation of his life, he needed "free air, in a situation where proper care " and medicines might be administered." His petition was answered, and the prayer of it was objected to, on the grounds that by the act of sederunt, the certificate should "be upon oath," and that "the magistrates should only give liberty to "reside in some house within the town," and with a protest in writing that the creditors did not give any consent even under the conditions of the act of sederunt. These objections were renewed by written minute, when the caution found was intimated, the sufficiency of which likewise was not admitted. But the magistrates "in respect of the attestation, and the certificates of the "petitioner's indisposition, granted warrant to the keeper of the tol- "booth of Canongate, to liberate the petitioner in

“terms of the act of sederunt.” In this deliverance they made no special appointment for his residence within the burgh; and it proceeded upon no deposition or examination of any medical person in their presence, and in the face of written objections repeatedly urged upon these grounds. Robertson, however, chose his own lodgings, and changed these from one house to another in the Canongate; but, during nine months, only frequented these lodgings when he had company to entertain there; and was seen daily in the most public places of resort, such as the Parliament-house, Leith races, &c.; and went at perfect freedom to Gogar, Inveresk, Bonnington, and other places within a forenoon’s ride of Edinburgh; and commonly spent his afternoons in drinking parties, and his nights out of the limits of the burgh of Canongate. While he was going on in this course, the pursuer raised his action against the magistrates, on the 17th of August, 1790. But this measure produced no step on the part of the magistrates, or change in the habits of Robertson. All this was fully proved. Confessedly too, during the whole nine months, at the close of which this course of dissipation terminated in his death, the magistrates had taken no charge of him whatever. But upon the other hand it was likewise admitted that the incarcerating creditors took as little; and did never apply for his reincarceration, or for any inquiry as to the state of his health.

Nevertheless it was strenuously contended by the pursuer in that case (as in the present), that the magistrates were bound to guard the prisoner constantly, and keep him in custody at some house

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within the burgh, during the whole period of his liberation, and that their failure to do so amounted in law to an escape. No question was ever more fully argued. The interlocutors of the Lord Ordinary assoilzieing the defenders were reclaimed against. On advising the first petition with answers, a condescendence was ordered. The deliverance on this condescendence with answers "repelled the objection as to the certificate not being upon oath, but allowed a proof." Both parties reclaimed, and the Court, upon these papers and minutes of debate, "ordained the parties to prepare interrogatories either by mutual agreement, or at the sight of the Court, to be transmitted to the clerks of the most considerable royal burghs in Scotland, respecting what has been the general practice thereof in liberating persons confined for civil debts, in terms of the act of sederunt, labouring under dangerous diseases, whether such liberations do proceed upon certificates granted by their medical attendants upon soul and conscience, or upon oath taken before the magistrates."

By agreement of the parties, these inquiries were extended to many other burghs, and were made by interrogatories in these terms :

"1. In liberating a prisoner confined for debt in the case of sickness, what evidence do you require of the state of his health? Send copies of the form of that certificate from your records."

"2. Do you assign the prisoner any particular place of residence during the continuance of his indisposition? Or upon what terms do you grant his liberation."

" 3. Do you take any security or bond of caution from the prisoner at his liberation? What is the nature of the security? Transmit a copy thereof."

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" 4. Do you take any charge of, or make any inquiries after, the conduct and behaviour of the prisoner during his being out of prison? Do you place him under any guard?"

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" 5. Has any alteration taken place in the manner and form of certificates, or part of the procedure, of late years? If so, point the same out, and transmit copies of both old and new forms."

" 6. Do you make any difference, or in any manner of way vary your proceeding, certificates, or bond, where there is opposition on the part of the creditor to the liberation of the debtor, or where there is no opposition?"

Answers were obtained on all of these points, and a proof at large was also taken. With respect to the form of the certificate, it appeared that the Court itself had recently before appointed liberation in the case of a Mr. Rankin from Falkirk, on a certificate of Mr. Alexander Wood, surgeon, upon soul and conscience, and that the practice of the burghs was various. As to residence, one half of the burgh answered that they "were not in use to fix any house for the residence of the debtor." In the other half it appeared that they sometimes pitched upon the debtor's own house, "whether within the burgh or not;" sometimes upon other houses within the burgh. All without a single exception answered, that it was "not the practice to keep any guard on, or take any charge of, the debtor after he was liberated, or to make any in-

Memorial for
Defenders,
p. 10.

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"quyry into his conduct;" and no fewer than thirty cases were stated to illustrate the practice of the burgh of Canongate itself.

With respect again to the actual conduct and habits of Robertson, the proof fully established the whole particulars which have been already stated upon the case, which was fully pleaded in mutual memorials. The Court sustained the defences and assolizied; and a long and able petition against this interlocutor was refused without answers.

The Respondents have had access to notes; from which it appears that the distinguished Judge then in the chair was of opinion, that "the form of certificate had in practice been various, and that it would be wrong in the Court to put too narrow and rigid a construction upon the act of sederunt; for the power of the Court to introduce such a regulation, and to throw the load off themselves upon the burghs, might be doubted." His Lordship indeed observed, that the chief "difficulty of the case arose from the circumstance that the agent of the creditors had required the certificate to be sworn to, yet this was overlooked;" but he also remarked that "the situation of magistrates is hard, and the act of sederunt ought to be reconsidered. The oath required by the act of sederunt must for the most part be extra-judicial, i. e. *ex parte*, as intimation is not necessary, nor is any precise form of an oath prescribed. The practice of the Canongate is material. Prisoners for debt are oftenest confined there. Either a new act of sederunt should be made, laying down the forms more precisely, or a clause introduced in the pro-

"posed act of parliament for burgh reform, or new
 "bankrupt act. The prisoner ought to be removed
 "to a certain house named; and if country air is
 "necessary, why may not a house in the country,
 "as near to the burgh as possible, with a garden or
 "certain other grounds, be fixed upon, with con-
 "currence of the sheriff or substitute? And if
 "execution cannot be found to the extent of the debt,
 "let him and his friends at least pay or find security
 "for indemnifying the magistrates of the expense
 "of a guard."

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The Lord Justice Clerk (M^cQueen) inclined to
 think, that *squater* is "out of the question, and
 "confinement within the burgh not necessary; as
 "the very purpose of the liberation is, that the
 "prisoner may recover health. It is enough to find
 "sufficient security to recommit him when required.
 "The hardship on magistrates would be intolerable
 "if otherwise."

"Lord Henderland concurred, and likewise
 "founded his opinion upon the circumstance that
 "the creditors did not apply to recommit him."

Lord Esgrove and a majority of the other Judges
 were of the same opinion; but Lords Dreghorn,
 Craig, and Abercromby, thought that the magis-
 trates had failed in their duty, "particularly as to
 "the neglect of the oath, and not appointing a
 "place of residence, and in taking no step after the
 "summons was executed." These, however, it will
 be recollected, are circumstances as to all of which
 the Respondents, in the present case, have acted
 most correctly.

The second and only other case which, so far as Fordyce v.

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1793, not re-
ported.

the Respondents have discovered, was ever tried on this point, was that of *Dr. Dingwall Fordyce* against the *Magistrates of Aberdeen*, likewise decided in the year 1793, after that of Forbes. It was reported to the whole Court by the Lord Justice Clerk, Ordinary, upon a proof and informations drawn by Lord Newton, and Lord Meadowbank, then at the bar. From the proof, it was established that Ross, a butcher in Aberdeen, the debtor, imprisoned in the tolbooth of that burgh, had been liberated without the consent of Dr. Fordyce, his incarcerating creditor; that he went home to his own house and trade during his liberation; and, upon one occasion, was at Inverurie in Banffshire, thirty-three miles from Aberdeen; upon another occasion had been at Overhills in the parish of Belhelvie, six miles from Aberdeen, and had staid two days there attending a cattle market; and that he was habitually and constantly, not only free from any guard or restraint, but living and employed as he would have been when at large in perfect health. Nevertheless, the Court, upon the same considerations which dictated the judgment in the previous case of Forbes, not only assoilzied the magistrates of Aberdeen, but found them entitled to expenses of process.

It will not be overlooked in this case, that the matter at present in question is the meaning of an act of sederunt, or rule of Court. The judgments in these two cases were precisely upon the same point which is at issue in the present case, and given in favour of the defenders, in cases stronger than the present for the pursuers. It was peculiarly the pro-

vince of the Court of Session to interpret the meaning of their own rule of court. From the words of the act of sederunt, and from the practice which, it appears from these cases, had been had under it, it seems to be abundantly clear, that these cases were well decided.

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But even if the decisions in these cases had been more doubtful, and had introduced a practice consonant to them, the Respondents conceive that the magistrates of royal burghs were entitled to look to these cases, as having given the true interpretation to the act of sederunt; and that if a pursuer, as in the present case, had sustained no injury whatever, the courts of law would have hesitated to give judgment in his favour in a case so highly penal, where magistrates had only acted in conformity to decided cases.

But the Respondents submit that it is not necessary for them to argue their case thus: they found upon no new practice introduced since these cases were decided, but upon the true sense and meaning of the act of sederunt, and the practice which all the burghs have had under it, downwards to this day.

On the other hand, the Appellant founded upon several cases, decided before the date of the act of sederunt: *Nisbet v. Drummond*, Haddington, 23d July, 1605; Lord Applegirth, suppliant, 1st Dec. 1609; and *Poplay v. Magistrates of Edinburgh*, 14th July, 1668. In the first of these cases it was found that, if a magistrate liberated a person confined for debt, it did not excuse the magistrate that the party re-entered himself to prison; this had no

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relation to a case of liberation for ill health. In the second of them, a liberation was permitted on account of bad health, the party being ordered to be "transported to a house in the town, upon caution" to be a prisoner there, and to return to prison upon "recovery." In the third of them, the magistrates of Edinburgh appear to have been found liable for a debt, having released the debtor *in extremis*, who died out of goal.

In these cases there is nothing hostile to the argument maintained by the Respondents; besides, the matter has since been regulated by the act of sederunt.

Town of Brechin v. Town of Dundee.

The Appellant founded also upon the before-mentioned case of *the Town of Brechin v. Town of Dundee*, which occasioned the making of the act of sederunt, particularly upon that part of the case which mentioned, "that magistrates of burghs have" only power to let prisoners come out of their "booths under a guard, in the extreme hazard of" "their life by sickness." It is sufficient also upon this, to refer to the act of sederunt itself; when it regulates the mode of enlarging prisoners on a bill of health, it says nothing of the necessity of a guard.

Stair, B. 4.
tit. 47. § 22.

The Appellant also founded upon a passage in Lord Stair's Institute on this point, in which his Lordship says, that "the Lords, by act of sederunt, 14th June, 1761, prohibited the magistrates of Edinburgh to suffer prisoners to go out without particular warrant, or the magistrates of other burghs not far distant, except in the imminency of death; and where such warrant is granted, the

"magistrates ought to choose the place of the prisoner's abode, that the same be secure, and guards attending." The Appellant stated that this doctrine of Lord Stair's was the more worthy of attention, as his Lordship had been appointed President of the Court of Session recently before this act of sederunt was made.

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It is not necessary to say any thing of the authority which is due to the opinions of that most eminent person; but in several particulars he does not state this act of sederunt accurately: it says nothing as to the "magistrates of Edinburgh, or the magistrates of other burghs not far distant," to whom, in his Lordship's view, the act of sederunt had been confined; nor does it say any thing of the "place of the prisoner's abode being secure, and guards attending." It is sufficient as to this to say, that universal practice has explained the act in this respect.

The Appellant also referred to a *dictum* of Lord Bankton on this subject. His Lordship, treating of a prisoner liberated on a bill of health, says: "And if he is returned to prison on his convalescence, the magistrates are free; but if he escape they are liable for the debt, because they ought to have had a guard upon him to prevent his escape: and this is settled by act of sederunt." It appears strange that the Appellant should have relied on this passage; in the first part of it, it is clear that his Lordship considered that there was no escape if the person liberated was "returned to prison on his convalescence." According to Lord Bankton's view, the magistrates in this case "are

Bankton, B. 1.
tit. 10. § 198.

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"free." It cannot be disputed that Wight was returned to prison even before his convalescence. With regard to the latter part of it, which mentions that "the magistrates ought to have had a guard upon him to prevent his escape," and that "this was settled by act of sederunt," it appears that his Lordship had implicitly followed Lord Stair as to this: it has already been noticed that the act is silent as to this point of a guard.

The Appellant also founded on a passage in Erskine, B. 4. tit. 3. § 14. on this subject, to which the Respondents also implicitly subscribe.

Fullarton and
Kennedy v.
Magistrates of
Ayr, Fac. Coll.
7th March,
1781.

The Appellant also referred to a case of *Fullarton and Kennedy v. the Magistrates of Ayr*, where in a circumstantiated case (very indistinctly stated in the report) the magistrates had been found liable for the debt of a person liberated on a bill of health. It is impossible to discover upon what grounds that case was decided; but it seems clear that there was one good ground for decision against the magistrates, the *not remanding the debtor to prison on his recovery*. The facts of the present case were very different.

The Appellant also founded upon the cases of *Gray v. the Magistrates of Dumfries*, 7th Dec. 1780; *Purdie and Co. v. the Magistrates of Montrose*, 29th June, 1786; *Wilson v. Magistrates of Edinburgh*, 8th July, 1788; and *Shortbread v. Magistrates of Annan*, 8th June, 1790; but none of these have relation to the case of liberation on a bill of health, but to ordinary cases of imprisonment. As such they can have no application here.

The Appellant also founded upon certain cases

relating to liberation of debtors on account of ill health, but of a class totally different from the present. These were the cases of *Charles Stewart v. the Magistrates of Edinburgh*, 20th Nov. 1799, and *Macqueen v. the Magistrates of Dundee*, in 1798 and 1799, (not reported). These cases relate to the question, what degree of freedom the magistrates of burghs can be compelled to allow to debtors liberated on account of ill health. It is obvious that this is a matter of extreme delicacy. In the first of these cases, the magistrates had sent a person liberated for ill health to the house of the captain of the town-guard, where he had a private room; in the other case Macqueen had been unable to obtain a *cessio bonorum*, and the magistrates of Dundee having reason to suspect that he meant to leave the country, though obliged to liberate him, guarded him in a private house. In neither case did the Court interfere to give explicit directions to the magistrates.

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The Appellant also referred to the cases of *Lindsay*, 27th Nov. 1797; *Donaldson*, 6th Feb. 1798; and *Mackenzie*, 9th March, 1799, for the purpose of showing what species of imprisonment will entitle a person to obtain a *cessio bonorum*. The Respondents do not find it necessary to enter into these cases; they have been well decided, and have no relation to the present case.

The Appellant also urged, that the magistrates of Canongate themselves had put the same construction on the act of sederunt that the Appellant contended for; that they had assigned him a particular house to reside in; and that the bond of caution

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stipulated that he should reside within the burgh, and not go out of the jurisdiction. These points, however, relate to the question what the magistrates are *entitled to require* from the prisoner before undertaking the responsibility of his liberation on a bill of health. But the question of their *liability* must be judged of upon other and very different grounds; upon the meaning of the act of sederunt, the usage had under it, and the authority of decided cases, all which the Respondents consider to be clearly with them.

Mr. Leach and *Mr. Abercromby* (for the Appellant.) The act was made in consequence of the case of *the Town of Brechin v. the Town of Dundee*, 1671, and was declaratory of what the law was, and intended to explain more distinctly the magistrates' duty, without doing away that restraint which was a means of recovering the debt. The Judges however thought themselves bound by the two cases of *Forbes* and *Fordyce*. The decision in the case of *Forbes* was most extraordinary, for the Court appeared to have thought that the magistrates might give any liberty to the prisoner, preventing only his escape out of the kingdom: and this was what they considered as the meaning of the act. In the present case two of the Judges were for the defendants, on the ground of the act of sederunt, independently of the authority of the cases; two of the Judges were for the pursuer, and one Judge (the President) was for the pursuer on the principle, but thought that as a Judge he was bound by the two cases. The President was astonished at the decision in the case

of Forbes, and, among his able observations on that case, asked why, if the magistrates had no more to do than to prevent the prisoner's escape out of the kingdom, they took him bound to reside within the burgh? If there were specialties in the case, the Judges had not decided upon them, but entirely on the general principle. The meaning of the act was clear, that the prisoner should reside within the burgh; and on the evidence it was an undoubted fact that Wight had never resided in the place appointed for him within the burgh. They gave no answer to that, but that the non-residence might have taken place during the six weeks from the time of the interlocutor in the *cessio*, and the time of the reclamation by the Appellant. This was a singular statement, because then the sureties were discharged; and how came they to call upon him to render himself to prison, and he to do so? But there was no necessity to reason from this inference; for Wight was not entitled to his discharge under the interlocutor till extract of the decret, which however never was extracted, as it was opposed with success. It was true that the Appellant's agent was asked whether he wished that Wight should return to prison, and he answered, no: but did that excuse the manner in which Wight was at large out of prison? As to the promise to give notice, that was fulfilled by the protest; and as to the borrowing of the caption, the letters of caption were required in order to be stated in the action; and it was not necessary that the magistrates should have them for the purpose of bringing the prisoner back again, as he was bound under the obligation to return when

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called upon. The true question was, whether it was the meaning of the act of *sederunt* that magistrates should be at liberty entirely to release prisoners on the ground of ill health. The law on this subject was the same before as it was after the act of *sederunt*, but a laxity had taken place in practice, which occasioned that act. The same laxity however seemed to have taken place lately, which appeared to be sanctioned by the case of *Forbes*, a decision made in direct contradiction to the act. (*Lord Eldon*, C. When the Court made an act of *sederunt*, and then declared in these cases what the meaning of its own act was, was it for a gaoler to say, No, you don't mean that?) That was a circumstance which rendered it of great consequence to appeal this case.

Sir S. Romilly and *Mr. Simpson* (for the Respondents). There were two views to be taken of this case: 1st, on the general principle; 2d, on the specialties. The Court below had decided on the general question, not thinking it necessary to advert to the specialties. If the judgment of this house should turn on the general principle, the present case was most important, not only with respect to the liberty of the subject and the responsibility of magistrates, but with regard to the state of the general law of the land. It was for their Lordships to determine, whether, where a point of law was laid down in a long train of decisions, and acted upon for a long course of years, it was not to be considered as settled till that point came to be decided by the House of Lords, leaving it uncertain

what the law was in England as well as in Scotland, *Fytche v. Bishop of London*, was the only case in which it had been said here that the law was unsettled till settled by the House of Lords. There was no case but that, in which this House had acted on such a principle; and the decision had been received with great surprise by the whole profession, and considered as a solitary instance not likely to occur again; (Lord Eldon, C. Lord Thurlow and Eyre, Ch. J, said they did not mean to contradict the decisions, The way in which they argued was, that there was no such train of decisions.) It was certainly too strong to say, that the decision of the House proceeded on that principle. But here the case of *Forbes* had been decided more than twenty years ago; and it had been acted upon uniformly till the year 1813, when it was questioned in this case. The Court too there decided upon its own act of sederunt. Then what their Lordships were called upon to say was, that the decisions of the Court below, interpreting their own act of sederunt, were of no authority till sanctioned by this House, which was to tell them the meaning of their own act. The long acquiescence in these decisions was equivalent to confirmation by this House; and the decision in the case of *Forbes* went further than the present, for it did not appear that there a certificate on oath was required, or that a house was appointed. They must argue that, if the prisoner was out of the jurisdiction one yard (that is, out of the precincts of the town, for the act did not there mention the word burgh, and town had no clear meaning, and was not a *nomen juris* in Scotland), the magistrates were

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liable for the debt. Attending then to the terms of the act they had to consider what the situation of the magistrates would be, if their construction were to prevail. By the act, the magistrates were bound to enlarge the prisoner upon evidence that his life would be endangered by confinement. And it signified nothing that the sickness was produced by the intemperance of the prisoner himself, if, in fact, his life was in imminent danger. Besides, there was no evidence that the magistrates were in any way apprized of his being out of the burgh. It would be a most extraordinary law which would compel the magistrates to set the prisoner at liberty, and then to be answerable for his escape. The act was of a penal nature, and ought to be construed strictly. The magistrates were not to permit the prisoner "to go out of prison, except in case of "the party's sickness and extreme danger of life, "&c. and that in that case the magistrates allow "the party only liberty to reside in some house "within the town." How could it be said that in this case the magistrates allowed him any other liberty? They did not allow it. A man did not allow what he had no notice of; and the magistrates had no notice of the debtor's non-compliance with the conditions till two days before the commencement of the action. All that the act required was mentioned in the bond. They did not contend for a guard; and Bankton said, that if the debtor returned to prison the magistrates were free, and here he did return. The Judges in the case of Forbes took the precaution to get answers from the magistrates of different burghs, as to what had been

done under the act; and the answers were that they had not been in the the habit of employing any guard, or making any inquiry, whether the debtor complied with the conditions. It must therefore be the business of the creditor to observe him, and to give notice to the magistrates that he did not comply with the conditions of his release, and had forfeited his title to the indulgence. The case of *For-dyce* followed, in which it was proved that the debtor was thirty-three miles from prison. The law therefore on the general principle had been settled, and it was no longer open to this House to question it. But secondly, though the opinion of the House should be against the Respondents on that point, yet the Appellant was precluded by his own acts from succeeding in his action. The debtor was at large on the 19th of January; and then the Appellant's agent, when asked whether he wished that *Wight* should be returned to prison, desired that nothing might be done till he gave notice, and promised that he would take no step without giving previous notice to the magistrates. All complaint was thus waived until notice; and immediately upon notice by the protest, *Wight* was called upon, and did surrender himself; and the gaoler refused to take him, as the Appellant had taken away the original caption, which by the law of Scotland it was necessary for him to have as his authority for keeping the debtor in custody.

Acts of *sederunt* were now with great propriety limited to matters of judicial form, and any alteration in the law must be made in another manner. All that the creditor could require was that the

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debtor should be confined on his convalescence, and that during his release he should reside near enough to be subject to the observation of the creditor. The bond and caution were the security of the magistrates, with which the creditor had nothing to do. They might relax if they chose. All the creditor could require was that the debtor should be imprisoned on convalescence. By the act, the residence must be limited to the town, which was a loose word, as town was not a *nomen juris* in Scotland. It was not the meaning that the debtor should not breathe the air of the country. If at any time of the day he was within the limits, the word *reside* was complied with. The sole criterion of escape was, the debtor's not returning on convalescence; and in no case were the magistrates liable if he did return on convalescence; the essential point was the sickness, and, in the cases cited on the other side, that circumstance was wanting. The precedents, since the time the act was made, were decidedly in favour of the Respondents. The evidence amounted only to this, that Wight was, during the period of his release on account of ill health, in some places out of the burgh, particularly in Surgeon's Square, which was however within the jurisdiction of the magistrates of Edinburgh, the superiors of the Canongate.

Mr. Leach (in reply). Their Lordships were called upon to give a general construction to the act, but were not called upon to reverse a train of decisions. There was only one case to be reversed; and that was one where the Court, instead of looking at the act, sent to the gaolers to ascertain the practice.

The act said there must be a certificate on oath; that case decided that the magistrates might discharge without oath. The act said that the debtor must reside in a house within the burgh; that case decided that the magistrates might permit him to go any where. The object of the act was to remedy the mischief of too much indulgence. The magistrates were restrained from suffering persons in their custody to go out of prison except only in case of sickness and extreme danger of life; and if they granted this indulgence except with the conditions prescribed by the act, they were to pay the debt. This was the true principle: it was not an obligation upon, but a permission to the magistrates to grant this indulgence upon certain conditions; and what were the conditions? The magistrates were "to allow the party only liberty to reside in some house within the town during the continuance of his sickness, they being always answerable that the party escape not." But now it was said that the magistrates might allow the party to go wherever he pleased within the kingdom. Where was the hardship that the magistrates should pay the debt, in case the party did not comply with the conditions? They might appoint a guard at the prisoner's expense, or take proper security, which they did in this instance. Even their own interlocutor showed that the debtor ought to be confined to a particular house within the burgh, and that if he was out of the burgh it was an escape. They did assign him a particular house within the burgh, but their keeper did not confine him there. He never was there. It was all mere mummery. It was impos-

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sible to look at the act without being convinced that this one judgment in 1793 was in direct contradiction to it. (*Lord Eldon, C.* Does it appear what the law of Scotland is on this subject, where there is a recapture before action brought?) The action commenced with the protest on the 10th May, 1809, and the debtor was not then in prison. They said indeed that they could not then imprison him, as the Appellant had taken the caption from them. But there was nothing in the objection; for the debtor was taken bound to return when required; and at any rate the caption, though in the hands of the Appellant, might be considered for this purpose as in the hands of the gaoler, and might have been actually in his possession if necessary. The debtor was never called upon to return till after the protest had commenced the action. With respect to the specialties they were not considered in the Court below as affecting the case. The debtor had been at large ten days before the interlocutor in the *cessio*, and the escape had been perfected before that judgment. But at any rate a debtor was not entitled to his discharge under it till the decret was extracted, and so it had been decided. Then they said that, after the 19th January, he was out by the Appellant's permission. But where was the permission? The agent asked for a copy of the bond and caution, and found that the debtor was bound not to leave the jurisdiction. That being the case, the agent said he did not wish that Wight should be returned to prison, and promised to take no step without notice. That proceeded on the supposition that the conditions were to be complied with, and did not dis-

charge the magistrates from the performance of their duty under the act of sederunt.

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Lord Eldon, (C.) This is an appeal in which it is contended that the magistrates of Canongate are answerable to the Appellant for a debt due to him from a person of the name of Wight, in consequence of their having allowed Wight to escape out of their custody. I do not mean to state the circumstances of the case at length; but the Court below thought that under the act of sederunt, 1671, the Respondents were not liable; and yet I should have some difficulty upon that point, if the construction of the act had not been in some measure settled by prior decisions.

It appears that, before the act of sederunt was made, magistrates were, by law, bound to great diligence in the confinement of prisoners; but by the humanity of some, and the negligence of others, the practice became a good deal relaxed; and in consequence of that circumstance this act of sederunt was made.

“The Lords considering, that albeit by the law
“magistrates of burghs are obliged to detain in sure
“ward and firmance persons incarcerate in their
“tolbooths for debt; yet hitherto they have been
“in use to indulge prisoners to go abroad upon several occasions, and it being expedient that in
“time coming the foresaid liberty taken by magistrates of burghs should be restrained, and the law
“duly observed, therefore the said Lords do declare,
“that hereafter it shall not be lawful to the magistrates of burghs upon any occasion whatsoever,

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“ without a warrant from his Majesty’s Privy Council, or the Lords of Session, to permit any person incarcerated in their tolbooth for debt, to go out of prison, except only in the case of the party’s sickness and extreme danger of life; the same being always attested upon oath under the hand of a physician, chirurgeon, apothecary, or minister of the gospel in the place ” (the persons holding these characters being therefore made judges of the fact); “ which testificates shall be recorded in the town court books. And in that case, that the magistrates allow the party only liberty to reside in some house within the town, during the continuance of his sickness; they being always answerable that the party escape not, and upon his recovery return to prison. And the Lords declare that any magistrates of burghs who shall contravene the premises, shall be liable in payment of the debt for which the rebel was incarcerated.”

Your Lordships perceive, therefore, that, upon such an attestation of sickness and extreme danger of life, the magistrates are to allow the prisoner liberty to reside in some house within the town, during the continuance of sickness, they being answerable that he escape not.

Wight had been incarcerated in the Canongate gaol, and, in consequence of the certificate upon oath of a physician, that his life was in imminent danger, had been liberated on the security of himself and two sureties, that Wight, during his temporary releasement for the recovery of his health, would restrict and conform himself agreeably to the terms and conditions of the said act of sederunt,

by residing in some house within the burgh, and would on no account go beyond the jurisdiction of the same, and that he would return as soon as he recovered his health, or when required: and the Appellant insists that the magistrates, in their proceedings with respect to Wight, contravened the provisions of the act of sederunt.

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Setting aside the specialties of the case, it appears that Wight was liberated, and remained out of custody for about nine months; and that during that period he had been spending his time sometimes in taverns, at other times in the gaol, and had been sometimes seen out of the jurisdiction of the burgh. Now, whatever opinion might have been entertained as to the proper construction of this act if the point had come before us twenty-two or twenty-three years ago; yet now, when the construction to be put upon it has been settled, by the Court which made the act, in two previous decisions, and has been acquiesced in since 1793, it is rather too much to say that the judgment in this case ought to be reversed upon that ground. Your Lordships will observe that this is not an act of parliament, but an act of sederunt, an act of the Court itself; and, in 1793, two cases, depending on the construction of this act, came before the Court, *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen*. And there the persons liberated paid as little attention to the obligations of their bonds as Wight is alleged to have done here; and yet, in these cases, the Court, construing its own act, held that the magistrates were not liable; and when the magistrates have been so

The construction of the act settled by the cases of Forbes and Fordyce.

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Both on the
general
ground and
on the special
circum-
stances, the
judgment to
be affirmed.

instructed by the Court twenty-two or twenty-three years ago, and have acted on these instructions ever since, it seems to be too much now to depart from that principle. Upon that ground, therefore, and also upon the special circumstances of the case, independent of the general principle, it appears to me that the judgment in this case ought to be affirmed.

With respect to the special circumstances, the Appellant knew that Wight was out of prison; he allowed him to obtain his *cessio bonorum* without opposition; * he himself took away and kept the letters of caption for some time: and one strong fact is, that when the Appellant, by his solicitor, Mr. Nathaniel Grant, applied for a copy of the bond of caution granted by Wight and his sureties to the Magistrates of Canongate upon his enlargement under the act of sederunt, and when the keeper of the prison records desired Mr. Grant to say "whether he wished Mr. Wight to be returned to prison," Mr. Grant in reply "expressly desired that nothing might be done till he gave notice, and declared that he on the other hand would take no step without giving previous notice to the magistrates." And yet it appears that he raised this action before he gave the magistrates notice that he wished that Wight should be re-incarcerated.

But on the general principle it is impossible to place the magistrates of burghs in this state, that

* Meaning, that no objection to the *cessio* was made till after Wight had been found entitled to it by interlocutor of 24th December, 1808. That interlocutor was afterwards reclaimed against, and the *cessio* was ultimately refused both by the Court of Session and House of Lords. (*Vid. ante* vol. ii. p. 377.)

they should be liable for an escape when acting in conformity to the construction which the Court put upon its own act; and if any alteration in the mode of proceeding in cases of this nature is necessary, it is more fitting that it should be made by act of parliament operating in future, than to say that those who were acting on the law as laid down twenty-two or twenty-three years ago by the Court of Session without question till this time, should be held liable for the debt as in case of an escape. It appears to me therefore that upon both grounds the judgment ought to be *affirmed*.

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Judgment *affirmed*.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDOWAL (ANDREW)—*Appellant*.

BUCHAN (JOHN)—*Respondent*.

A PERSON employed as a gentleman's general law agent in purchasing lands, making payments, in conveyancing and expeding titles, receives, in behalf of his employer, the rents of a small detached property let to inferior tenants, without any written commission as factor, and under circumstances which showed that it was not expected that he should compel payment of the rents by ultimate diligence, as in the case of a country factor, though he charged factor's fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original em-

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FACTOR NOT
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UNDER THE
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CES OF THIS
CASE, FOR
RENTS LOST
BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.

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July 2, 1817.

FACTOR NOT
LIABLE,
UNDER THE
CIRCUM-
STANCES OF
THIS CASE, FOR
RENTS LOST
BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.

ployer calls upon the agent for payment of the amount of the rents lost during the time of his management by such insolvency; as he might have compelled payment by incarceration, sequestration, and a roup of effects, but neglected to do so. Held by the House of Lords, affirming a decision of the Court of Session, that, under the particular circumstances of the case, the agent was not liable for the rents so lost.

But the agent having been called upon by his employer for a general account, and not having kept his accounts in such a state that they could be readily produced, and the delay having been the immediate cause of bringing an action for an account, though the sum justly due was less than the sum claimed, and the decision below in favour of the agent was affirmed above, it was so affirmed without costs.

Mr. J. Mac-
dowal lets
Bankton to
small tenants.

JOHN MACDOWAL, of Logan, in 1773, became proprietor of about 110 acres of land, called Bankton, in East Lothian. At that period these lands were occupied partly by old servants of Lord Bankton, from whom Mr. Macdowal had the property, who were considered as kindly tenants; and the remainder was let by Mr. Macdowal in small patches to labouring people, who earned their subsistence chiefly as carriers of the produce of the neighbouring potteries, salt-works, &c. to Edinburgh.

The Respondent, Mr. Buchan, was nearly related to Mr. John Macdowal, and was, for many years, employed by him as a conveyancer and cashier, in paying claims against him, in lending his money, in making purchases of land for him, and in expediting titles to his different estates. The general employment of the Respondent was of a more important nature than that of a country factor, and it

did not appear that he would have accepted of the factorship of Bankton, with the obligation to enforce payment of the rents from the small tenants by the use of ultimate diligence. But Bankton being at no great distance from Edinburgh, the tenants were directed to pay their rents to the Respondent; and he continued for several years to uplift such of the rents as could be obtained without a strict administration, which Mr. John Macdowal did not insist upon. The Respondent had no written commission as factor, and the property was managed chiefly by Mr. Cadell, a friend of Mr. John Macdowal, who resided in the neighbourhood. The Respondent, however, charged factor's fees.

From the description of tenants who occupied Bankton, and the lenient administration adopted in regard to them, the rents were not regularly paid; but the Respondent did not execute ultimate diligence against them by incarceration, sequestration, and a roup of effects; and when he settled accounts with Mr. John Macdowal, in 1781, the arrear of rents for Bankton amounted to 266*l*. The same system of management was however persisted in by Mr. John Macdowal till 1785, when he determined to adopt a plan of strict administration with respect to this property, and granted a written commission or factory to Mr. Adam Bell, writer in Edinburgh, for that purpose.

It appeared from some correspondence between Mr. John Macdowal and Mr. Buchan, that the former imputed some blame to the latter for his loss of his Bankton rents, but that he at the same time considered these arrears, which it became impossible to recover, as lost to himself, and not as money

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BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.

Mr. Buchan,
the general
law agent of
Mr. John
Macdowal,
uplifts the
rents of Bank-
ton, without
being bound
to a strict ad-
ministration.

Settled ac-
count in 1781.
Rents in ar-
rear.

1785. An-
other factor
appointed for
Bankton.

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LIABLE,
UNDER THE
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LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE;

Mr. J. Mac-
dowal calls
upon Mr.
Buchan for a
general settle-
ment of ac-
counts.

1794. Action
for an ac-
count.

Account pro-
duced. 1799,
Death of Mr.
J. Macdowal,
succeeded by
his son, the
Appellant,
who objects
to the ac-
count. The
account and
objections re-
ferred to ac-
countant. Re-
port objected
to by Appel-
lant, because
Respondent
was not charg-
ed with rents
of Bankton
lost by insol-
vency of the
tenants.

Ground of
objection, that
Respondent
had the power

which the Respondent was bound to make good. The Respondent, for some time subsequent to 1785, continued to act as the agent of Mr. Macdowal in his general and more important concerns. Some years afterwards, Mr. John Macdowal called upon the Respondent for a general settlement of accounts. It appeared that the Respondent had not kept his accounts in such a way that they could be immediately prepared; and a considerable delay having taken place, Mr. John Macdowal, in 1794, raised an action against the Respondent, calling upon him to account "for the sums put into his hands" and intromitted with by him."

The account was at length produced, and the admitted balance paid, after which the process fell asleep. In 1799, Mr. John Macdowal died; and his son, the Appellant, having intimated an intention to waken the action, the Respondent consented that it should be considered as awakened. Objections were then given in, and the accounts and objections were referred to an accountant, who made a report, to which no objection was made for two years by either party. The Appellant then again awakened the process, and gave in objections to the Report, the chief of which was, that the Respondent had not been charged with such of the rents of Bankton as had been lost, during the time of his management of the Bankton property, by the insolvency of the tenants. The ground of this objection was, that the Respondent, having been factor on the property, had neglected to use the proper means to compel payment of the rents. The answer was, that the Respondent was factor only, in the sense of agent or receiver, and not in the sense of administrator;

that it was clear from all the circumstances of the case that the Appellant's father never intended, during the time of the Respondent's management, that the tenants who occupied Bankton should be subject to a strict administration, and was well aware, from the general nature of the Respondent's business, that he never would have undertaken the management on such terms; also, that the summons called for an account of such sums only as the Respondent had received. The following authorities were quoted with respect to the duties of factors.

Mr. Erskine says, "In improper mandates, when salaries are either expressly given or presumed from circumstances, the mandatory, conformably to the general rule of the Roman law, *præstat culpam levem*, is obliged to act with the diligence and discretion which a man of prudence uses in his own affairs:—Macbridge, January 1, 1680; Gibson, July 18, 1710:—and consequently if, through any neglect in the execution of his commission, a damage shall arise, he is liable to make it up to his employer, or other person who suffers by it. New Coll. II. 2.—This is the case of factors, whether granted by the Court of Session on sequestrated estates, or by private persons with salaries annexed to them."

"A factor must either do diligence, or acquaint his constituent with his reasons for not doing it; and in a case where a factor gave such notice, and his constituent gave no orders for diligence, but left it to his discretion, the Lords found that the factor could not be held negligent in the event of the debtor's insolvency:—Kilk. February 8, 1740; *Mac Caul contra Varcils*."

June 2,
July 2, 1817.

FACTOR NOT
LIABLE,
UNDER THE
CIRCUM-
STANCES OF
THIS CASE, FOR
RENTS LOST
BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.

to have en-
forced pay-
ment, and
neglected to
do so. An-
swer, that Re-
spondent was
factor only in
sense of agent
or receiver,
and not as ad-
ministrator.
Book iii. tit.
3. sect. 37.

Dict. vol. ii.
p. 132.
For Dili-
gence.

June 2,
July 2, 1817.

FACTOR NOT
LIABLE,
UNDER THE
CIRCUM-
STANCES OF
THIS CASE, FOR
RENTS LOST
BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.
Harcare.

“ A merchant whose estate consisted of accounts
“ and book debts to the value of 20,000*l.*, having
“ left Balbedy tutor-testamentary, the Lords found
“ this defence relevant to purge the tutor’s negli-
“ gence to pursue all the debtors in the account-
“ books, viz. that he had employed the defunct’s
“ nephew, who had been his apprentice, to draw
“ out a list of such of the debts as he thought were
“ resting, which list was acquiesced in by the relict,
“ who had a share of the free gear ; and that he had
“ pursued on the said list, and that many of the
“ persons inserted therein as debtors had assoilzied
“ themselves by their oaths, which was the only
“ means of probation then competent, whereby the
“ pupil saved much unnecessary expense that would
“ have been laid out in pursuing more of the debtors,
“ whom there was no probability to overtake :—
“ *Pirias and Garpin against Balbedy*, Feb. 1682.

June 26,
1812. Judg-
ment below
for Respond-
ent, Buchan.

The Court, by interlocutor, 26th June, 1812, re-
pelled the objections to the Report, and, upon re-
clamation, adhered to that interlocutor. From that
judgment Mr. Macdowal appealed.

The case was heard in the House of Lords on the
2d June, 1817. *Sir S. Romilly* and *Mr. Brougham*
for Appellant; *Mr. Leach* and *Mr. Adam* for
Respondent.

Judgment.
July 2, 1817.

Lord Eldon C. (after stating the case). The
items are many in number, which rendered it
necessary to take some time to examine them with
attention. I have done so, and it is my humble
advice that the judgment should be affirmed ; for,
under the particular circumstances of the present case,

I think Buchan is not answerable as he would have been if he had been acting strictly in the character of factor, and had not on the contrary been acting on principles which displaced the obligation, that would attach upon him by the general principles of law as applicable to factors.

But it was insisted also that the judgment should be affirmed with costs. I cannot, however, concur in that; for though the just demands against Buchan were less than the claims insisted upon by the other party, yet from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced; and the contest has, in some measure, arisen from his failure in that duty. I propose therefore that the judgment be affirmed, but without costs.

June 2,
July 2, 1817.

FACTOR NOT
LIABLE,
UNDER THE
CIRCUM-
STANCES OF
THIS CASE, FOR
RENTS LOST
BY HIS NEG-
LECT TO EN-
FORCE PAY-
MENT BY UL-
TIMATE DILI-
GENCE.

Buchan not
acting strictly
in character
of factor, and
not liable in
payment of
the loss.
Costs.

Judgment *affirmed* accordingly.

Judgment af-
firmed.

ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

DORAN—*Plaintiff in error.*

O'REILLY and others—*Defendants in error.*

Debt in K. B. and demand made in lawful money of Great Britain, founded upon a judgment of the supreme Court of Jamaica obtained in an action of assumpsit in that Court for so much Jamaica currency,—the declaration in K. B. stating that this amounted to so much in British money. Final judgment by default against the Defendant, and error brought in the Ex. Ch.; and there, the errors not being argued, judgment affirmed, and thereupon error in Dom. Proc. Held that

March 7,
1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

March 7,
1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

the demand being made in lawful money of Great Britain, and the Defendant below having suffered judgment to go against him by default, he had himself assessed the amount, and that there was no occasion to send the matter to a jury by writ of inquiry.

Count in the declaration for interest upon the forbearance of money on request: This is well laid, a promise to pay interest being implied.

Where errors are argued in Dom. Proc. without having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the House will make the plaintiff in error pay the costs of the proceedings there, as if the case had not been argued at all in that House.

Action of debt
in K. B. upon
a foreign judg-
ment obtained
in assumpsit.

THIS was an action in debt commenced by the Defendants in error in the Court of King's Bench in 1815, to recover from the Plaintiff in error the sum of 4934*l.* 11*s.* of sterling British money, due to them upon and by virtue of a certain judgment obtained by them against the Plaintiff in error in the supreme Court of Judicature in and for the Island of Jamaica, before the chief Judge and his associates Judges of that Court, in a suit for non-performance of certain promises and undertakings made by the said Plaintiff in error to the Defendants in error. The first and second counts in the declaration in the action in K. B. at Westminster, founding on the foreign judgment, were as follows:

Declaration.

“London (to wit). Thomas O'Reilly, George
“Young, William Gordon, John Murphy, and
“James Farrell, who have survived James Wester-
“man May, their late partner now deceased, com-
“plain of William Doran, who hath survived Da-
“niel Robinson now deceased, being in the custody
“of the marshal of the Marshalsea of our Lord
“the now King, before the King himself, of a plea

" that he the said William Doran render to them
 " the said Thomas, George, William Gordon, John,
 " and James Farrell, the sum of fifty-four thousand
 " pounds of lawful money of Great Britain, which
 " he the said William Doran owes to, and unjustly
 " detains from them. For that whereas the said
 " Thomas, George, William Gordon, John, James
 " Farrell, and James Westerman, heretofore and in
 " the life-time of the said James Westerman, to wit,
 " the first Monday in October, in the fifty-first year
 " of the reign of our sovereign Lord the now King,
 " and in the year of our Lord one thousand eight
 " hundred and eleven, in a certain court of our said
 " Lord the King, called a supreme Court of Judi-
 " cature, held for our said sovereign Lord the King,
 " at the town of Saint Jago de la Vega, in the
 " county of Middlesex, in and for the island of Ja-
 " maica, and within the jurisdiction of the said
 " Court, to wit, at London, in the parish of Saint
 " Mary-le-Bow, in the ward of Cheap, on the day
 " and year aforesaid, before the Honourable John
 " Lewis, Esquire, Chief Judge of the said Court,
 " and his associates, then sitting Judges of the same
 " Court, in a certain action in the said Court
 " brought by the said Thomas, George, William
 " Gordon, John, James Farrell, and James Wes-
 " terman, against the said William Doran, and the
 " said Daniel Robinson, for the non-performance of
 " certain promises and undertakings by the said
 " William Doran and Daniel, before that time made
 " to the said Thomas, George, William Gordon,
 " John, James Farrell, and James Westerman, by
 " the consideration and judgment of the same Court
 " recovered against the said William Doran and the

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ERROR.—
 DEBT.—FO-
 REIGN JUDG-
 MENT.—WRIT
 OF INQUIRY.
 —COSTS.

First count on
 foreign judg-
 ment.

March 7,
1817.

ERROR —
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY
—COSTS.

“ said Daniel, the sum of five thousand six hundred
 “ and seventy-five pounds two shillings and six
 “ pence current money of Jamaica aforesaid, which
 “ in and by the said Court was then and there ad-
 “ judged to the said Thomas, George, William Gor-
 “ don, John, James Farrell, and James Westerman,
 “ for their damages which they had sustained in
 “ that behalf, and also five pounds seven shillings of
 “ like current money for their costs and charges by
 “ them about their suit in that behalf expended to
 “ the said Thomas, George, William Gordon, John,
 “ James Farrell, and James Westerman, by the
 “ Court there of their own assent adjudged;
 “ whereof the said William Doran and Daniel were
 “ convicted, which said judgment still remains in
 “ the said Court in full force, not in any way re-
 “ versed, annulled, paid off, or satisfied, to wit, at
 “ London aforesaid, in the parish and ward aforesaid.
 “ And the said Thomas, George, William Gordon,
 “ John, and James Farrell, in fact say that neither
 “ the said Thomas, George, William Gordon, John,
 “ James Farrell, and James Westerman, or either
 “ of them, in the life-time of the said James Wes-
 “ terman, or the said Thomas, George, William
 “ Gordon, John, and James Farrell, or either of
 “ them, since the decease of the said James Wes-
 “ terman, have as yet obtained any execution or sa-
 “ tisfaction of and upon the said judgment so re-
 “ covered as aforesaid; and that the said damages,
 “ costs and charges so recovered as aforesaid, amount
 “ in the whole to a large sum of money, to wit, to
 “ the sum of five thousand pounds of lawful money
 “ of Great Britain, to wit, at London aforesaid, in
 “ the parish and ward aforesaid. Whereby and by

“ reason of the said last mentioned sum of money
 “ still being and remaining wholly unpaid, an ac-
 “ tion hath accrued to the said Thomas, George,
 “ William Gordon, John, and James Farrell, to
 “ demand and have of and from the said William
 “ Doran the said last mentioned sum of five thou-
 “ sand pounds, parcel of the said sum above de-
 “ manded. And whereas also the said Thomas,
 “ George, William Gordon, John, James Farrell,
 “ and James Westerman, heretofore and in the
 “ life-time of the said James Westerman, to wit,
 “ on the said first Monday in October, in the said
 “ fifty-first year of the reign of our said sovereign
 “ Lord the now King, and in the said year of our
 “ Lord one thousand eight hundred and eleven, in
 “ a certain Court of our said Lord the King,
 “ called a supreme Court of Judicature, held for
 “ our said sovereign Lord the King, at the said
 “ town of Saint Jago de la Vega, in the county of
 “ Middlesex; in and for the said island of Jamaica,
 “ and within the jurisdiction of the said Court, to
 “ wit, at London aforesaid, in the parish and ward
 “ aforesaid, the day and year last aforesaid, before
 “ the said Honourable John Lewis, Esquire, chief
 “ Judge of the said Court, and his associates then
 “ sitting Judges of the same Court, by the consi-
 “ deration and judgment of the same Court, reco-
 “ vered against the said William Doran, and the
 “ said Daniel, the sum of five thousand six hun-
 “ dred and seventy-five pounds two shillings and
 “ six-pence of like current money of the said island
 “ of Jamaica, which in and by the said Court was
 “ then and there adjudged to the said Thomas,
 “ George, William Gordon, John, James Farrell,

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1817.

ERROR.—
 DENT.—FO-
 REIGN JUDG-
 MENT.—WRIT
 OF INQUIRY.
 —COSTS.

Second count
 on foreign
 judgment.

March 7,
1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

“ and James Westerman, for their damages which
 “ they had sustained by reason of the non-perform-
 “ ance of a certain promise and assumption then
 “ lately made by the said William Doran, and Da-
 “ niel, to the said Thomas, George, William Gor-
 “ don, John, James Farrell, and James Wester-
 “ man, and also five pounds seven shillings of like
 “ current money, for their costs and charges by
 “ them about their suit in that behalf expended to
 “ them the said Thomas, George, William Gordon,
 “ John, James Farrell, and James Westerman, by
 “ the Court there of their own assent adjudged,
 “ whereof the said William Doran, and Daniel were
 “ convicted, which said last mentioned judgment,
 “ still remains in the said Court in full force, not
 “ in any way reversed, annulled, paid off, or satis-
 “ fied, to wit, at London aforesaid, in the parish
 “ and ward aforesaid; and the said Thomas, George,
 “ William Gordon, John, and James Farrell, in
 “ fact, further say, that neither the said Thomas,
 “ George, William Gordon, John, James Farrell,
 “ and James Westerman, or either of them, in the
 “ life-time of the said James Westerman, or the
 “ said Thomas, George, William Gordon, John, and
 “ James Farrell, or either of them, since the decease
 “ of the said James Westerman, have as yet ob-
 “ tained any execution or satisfaction of and upon
 “ the said last mentioned judgment so recovered as
 “ last aforesaid, and that the said last mentioned
 “ damages, costs, and charges, so recovered as last
 “ aforesaid, amount in the whole to a large sum of
 “ money, to wit, to the sum of five thousand
 “ pounds of like lawful money, to wit, at London
 “ aforesaid, in the parish and ward aforesaid, where-

“ by and by reason of the said last mentioned sum
 “ of five thousand pounds still being and remaining
 “ wholly unpaid, an action hath accrued to the said
 “ Thomas, George, William Gordon, John, and
 “ James Farrell, to demand and have of and from
 “ the said William Doran the said last mentioned
 “ sum of five thousand pounds further parcel of the
 “ said sum above demanded.”

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 1817.
 ERROR.—
 DEBT.—FO-
 REIGN JUDG-
 MENT.—WRIT
 OF INQUIRY.
 —COSTS.

Then followed counts for goods sold and delivered,
 money borrowed, money paid, money had and re-
 ceived, interest, and on an account stated. The
 count for interest was in these terms : “ And where-
 “ as also the said William Doran, afterwards, and
 “ after the death of the said James Westerman, to
 “ wit, on the first day of October in the year of
 “ our Lord one thousand eight hundred and fifteen,
 “ at London aforesaid, in the parish and ward afore-
 “ said, was indebted to the said Thomas, George,
 “ William Gordon, John, and James Farrell, in the
 “ further sum of two thousand pounds, of like law-
 “ ful money for money before that time and then
 “ due and payable from the said William Doran to
 “ the said Thomas, George, William Gordon, John,
 “ and James Farrell, for interest upon and for the
 “ forbearance of divers other large sums of money,
 “ before then due and owing from the said William
 “ Doran and Daniel, during the life of the said
 “ Daniel, and the said William Doran, since the
 “ death of the said Daniel, to the said Thomas,
 “ George, William Gordon, John, James Farrell,
 “ and James Westerman, in the life-time of the
 “ said James Westerman, and to the said Thomas,
 “ George, William Gordon, John, and James Far-
 “ rell, since the death of the said James Wester-

Count for in-
 terest.

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

“ man, and by the said Thomas, George, William
“ Gordon, John, James Farrell, and James Wes-
“ terman, in the life-time of the said James Wes-
“ terman, and since his death, by the said Thomas,
“ George, William Gordon, John, and James Far-
“ rell, forborne to the said William Doran and the
“ said Daniel in his life-time, and to the said Wil-
“ liam Doran, since the death of the said Daniel,
“ at their special instance and request for divers
“ long spaces of time, before then elapsed, and to
“ be paid by the said William Doran, to the said
“ Thomas, George, William Gordon, John, and
“ James Farrell, when he the said William Doran
“ should be thereunto afterwards requested ; where-
“ by, and by reason of the said last mentioned sum
“ of money being and remaining wholly unpaid, an
“ action hath accrued to the said Thomas, George,
“ William Gordon, John, and James Farrell, to de-
“ mand and have of and from the said William
“ Doran the said last mentioned sum of money, fur-
“ ther parcel of the said sum above demanded.”

Defendant
makes default,
and final judg-
ment signed.

Error in
Exch. Ch.

Error in
Dom. Proc.

The Plaintiff in error having suffered judgment to go against him by default, final judgment was signed on the 11th January, 1816, for the debt demanded, and 22*l.* damages and costs. Upon this a writ of error was brought in the Exchequer Chamber, where, general errors only having been assigned and not argued, the judgment was affirmed on the 13th November, 1816. The Plaintiff in error then brought a writ of error returnable before the Lords in Parliament, which, with a transcript of the record, was brought up on 28th January, 1817 ; and the Plaintiff assigned the general error, and a special error not insisted upon. The House took the cause

for hearing out of its course, as it usually does where it is apprehended that the writ of error is brought merely for delay, and the agents having been ordered to attend, and asked whether they were ready to proceed to hearing, and it having been stated on the part of the Plaintiff, that he had additional errors to assign, and a short day having been appointed for assigning the errors, the hearing was fixed for the 7th March, 1817. The errors, as stated in the case for the Plaintiff in error signed by Mr. Richardson, were these:

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1817.
ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

“ The Plaintiff in error humbly conceives that Errors.
“ the declaration and judgment in this case will
“ appear erroneous to your Lordships.

“ He contends that the action of assumpsit is in
“ its form and nature an action of tort, though
“ founded upon contract—and that damages given
“ for a tortious breach of promise cannot be con-
“ verted into a debt by the judgment of any court of
“ foreign judicature ; that the judgment in an action
“ of assumpsit given by such court of foreign judica-
“ ture, is indeed good *prima facie* evidence of the
“ breach of the promises and undertakings therein
“ complained of, but that it is no evidence of any
“ debt subsisting between the parties to such action,
“ nor of the amount of the same.

“ Also, that debt cannot be maintained for the
“ value of foreign money, or for other demand,
“ which in its nature is wholly uncertain in amount,
“ and can only be ascertained by the finding of a
“ jury.

“ Also, that if debt can be maintained for a de-
“ mand which in its nature is wholly uncertain in
“ its amount, judgment ought not to be entered up

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

“ for such amount as the Plaintiff may choose to
“ suggest, nor ought it to be final in the first in-
“ stance, but a writ of inquiry ought previously to
“ issue to ascertain the amount, and judgment
“ should be entered up accordingly.

“ Also, that by the law of the land interest is
“ not demandable on the forbearance of money
“ though forborne on request, without a special
“ contract for the same; and that such contract, or
“ the grounds from which it may be implied, ought
“ to appear upon the face of the declaration.

“ Also, that the manner in which money becomes
“ due and owing ought to appear on the face of the
“ declaration, that the Court may be enabled to
“ judge whether interest be demandable for the
“ forbearance of the same; and that it is too gene-
“ ral and altogether uncertain to state that money is
“ due and payable for interest upon, and for the
“ forbearance of money due and owing, without
“ stating on what account.”

Writ of in-
quiry.

Mr. Richardson (for Plaintiff in error). One of the errors, and it goes to the whole record, is, that a general judgment ought not to have been entered up till a writ of inquiry had been issued to ascertain the amount of the sum due. The proceedings in the Courts, in actions of debt, have varied. Formerly it was necessary to state the contract with precision, and the exact sum; and if there was a variance between the sum laid in the declaration and the sum really due, the Plaintiff failed altogether. There was no occasion at that time for the inquiry. But ever since the case of *Aylett v. Lowe*, 2 Blac. R. 1221, any sum may be recovered not

Vid. also
Emery v. Fell,

exceeding the sum claimed, and so it was held also in *M'Quillin v. Cox*, 1 H. B. 249. It was then no longer necessary to state the exact sum, and the amount became as indefinite in debt as in assumpsit. This alteration, making the sum really due as indefinite in debt as in assumpsit, was attended however with this inconvenience, that the amount must be assessed at the trial; and in a judgment by default, or upon demurrer, an inquiry is necessary. There are cases where a writ of inquiry has been directed in debt; *Blackmore v. Flemyng*, 7 T. R. 446.: and there is no decision that it is unnecessary.

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ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
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2 T. R. 28.—
Bonafous v.
Walker, ib.
126.—Lord v.
Houston,
11 East. 62.

Another objection is, that the cause of action in the foreign Court is assumpsit, and the judgment of a foreign Court in such an action is not a sufficient ground for an action of debt in this country. In *Walker v. Witter*, 1 Doug. 1; the ground of action in the foreign Court was itself *debt*.

Judgment in
foreign Court.

Another objection is, that the recovery is in foreign money, and the Court cannot, without evidence, know the amount in British money. There is a difference in the practice of the Courts with respect to foreign and British money, and foreign and inland bills of exchange. With respect to British money and inland bills of exchange, where the amount is simply a matter of computation, the Court refers it to the Master, to calculate and ascertain the amount of the sum due. But with respect to foreign bills and foreign money the Courts direct a writ of inquiry: *Maunsell v. Massareene* (Lord), 5 T. R. 87. Such was the course adopted in early times also, in regard to foreign money, as appears from *Bagshaw v. Playn*, Cro. El. 536; where it was held to be error that no inquiry was executed,

Foreign
money.

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ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

as the value of Flemish money was not known to the Court. (*Lord Eldon*, C. Did the Plaintiff there claim in Flemish money?) He claimed 47*l.* Flemish money, amounting to 40*l.* English. (*Lord Eldon*, C. What did the Defendant plead?) He pleaded *plene administravit*, which is not to the present purpose; but the judgment was set aside. (*Lord Eldon*, C. The Court will ascertain the amount by its own officer now.) No, not in questions as to foreign money and foreign bills of exchange; nor in any case except where the amount is a matter of mere calculation. In *Cuming v. Monro*, 5 T. R. 87. a case of proclamation money of an American State, the Court would not send it to the Master to fix the value of foreign money, but directed an inquiry; and thus the Court acted in *Maunsell v. Massareene*, in the same page, so that the distinction was supported by the modern as well as the ancient cases. In *Rands v. Peck*, Cro. Jac. 617. which was an action of debt, for that the Defendant owed to the Plaintiff 600 guilders *monetæ Poloniæ*, and that the value was 220*l.* *legalis monetæ Angliæ*, &c., the Jury found that the value was 220*l.* English, the value not being otherwise known to the Judges.

Interest.

Then with respect to the count for interest, no contract is shown; and *debt* does not lie for interest on the forbearance of money on request. It must be founded on contract in some way or other, and no such thing appears here. In *Seaman v. Dee*, 1 Vent. 198. it was decided on the authority of Lord Hale, that interest could not be recovered in debt, unless upon contract, and that the proceeding must be by *assumpsit* and damages. I am

aware that some doubt has been thrown on that doctrine, by what Lord Kenyon said in *Herries v. Jameson*, 5 T. R. 553.: but it was not overruled in that case, nor was it necessary there that it should be overruled.

March 7, 1817.
ERROR.—FOREIGN JUDGMENT.—WRIT OF INQUIRY.—COSTS.

The result of the whole then is, that in actions of debt, the amount of the sum really due is as indefinite as in *assumpsit*; that there exists the same reason for directing an inquiry in debt as in *assumpsit*; that the Court ascertains the amount by reference to the Master only in cases where it is a matter of mere computation; that all the reasons which apply to cases of tort and *assumpsit* apply to cases of debt, and that the same inquiry ought to have been directed, at least with respect to the foreign money counts, as to which the proposition is supported, not merely by the reason of the thing, but also by decided cases.

Mr. Littledale (for Defendant in error). There is no case in which a writ of inquiry has been directed in an action of debt, where the demand has been in lawful money of Great Britain; and *Mr. Richardson* himself in *Taylor v. Capper*, 14 East. 442. admitted that he had not been able to find any instance of it. He relied on two cases, *Bagshaw v. Playn*, Cro. El. 536. and *Rands v. Peck*, Cro. Jac. 617. But in the former the demand was in Flemish money, and as the judgment must be for Flemish money, it was thought that a writ of inquiry should have been directed to ascertain the value. But even in actions for foreign money it has not been thought necessary always to direct an inquiry. In a case cited in *Bagshaw v. Playn*, where debt was brought

Foreign money.

David v. Wychalls.

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDGE-
MENT.—WRIT
OF INQUIRY.
—COSTS.

for 20*l.* English, and the Plaintiff declared on 22*l.* Portuguese, value 20*l.* English, the judgment for 20*l.* was held right without an inquiry. As to the case of *Rands v. Peck*, in Cro. Jac. 617, the demand there was in Polish money; and as the judgment must be for Polish money, the value was found by a jury. In *Draper v. Rastall*, Cro. Jac. 88, referred to in *Rands v. Peck*, the action was for 39*l.* for that the Plaintiff had sold to the Defendant three northern clothes for 66*l.* *monetæ Flandriæ*, amounting, *tempore emptionis*, to 39*l.* *Angliæ*; and, on motion in arrest of judgment, for that the demand ought to have been for 66*l.* Flemish, according to the contract, it was held that the demand in English money was well made, and; if made contrary to the truth, the Defendant might have pleaded in abatement; and that, as it was admitted on the record that so much was due in British money, no further inquiry was necessary. So that the distinction is whether the demand is or is not made in British money; and the demand, in these cases, may be well made in British money; for, even in the common action of assumpsit, *Harrington v. Macmorris*, 5 Taunt. 228. it was held to be no variance that the allegation was a loan in British money, and the proof a loan in foreign.

What then is the principle with respect to the directing of writs of inquiry? In 5 Com. Dig. Debt, (A.) 8. it is stated that Debt may be brought for a *quantum meruit* with an allegation that the worth is so much: *Vaux v. Mainwarring*, Fort. 197.; *Bloome v. Wilson*, Jones (Sir T.), 184. So that it has been the practice to bring debt on a *quantum meruit* with an allegation that the worth

was so much ; and how is it that it was not thought of to direct a writ of inquiry for a jury to ascertain how much was due ? The truth is, that a writ of that description is not necessarily directed in any case. It is merely an inquest of office to inform the conscience of the Court, for the judges themselves may assess the damages : 1 Roll. Abr. 571—573, *et ib cit. Ley v. Folliot (Lord)* ; Brookes' Abr. *Damages*, pl. 54—194. There are an infinite variety of cases in the old books where this language ; that the justices may assess the damages, is held ; and it has been also held in more modern cases, as in *Holdipp v. Otway*, 2 Saund. 106. I am aware that the case is not directly in point, and I mention it only with reference to the language. And, even so late as the early part of his present Majesty's reign, Wilmut, Ch. J. said in *Bruce v. Rawlins*, 3 Wils. 61, 62. that the judges might assess the damages. That is the principle on which the Court refers it to the Master to ascertain the sum due, because the judges may take the matter out of the hands of a jury when they please. *Mr. Richardson* says that they direct an inquiry to ascertain the value of foreign money. They usually do, but they may refer that too to the Master if they think proper. The reason why the Court directed an inquiry in the case of *Cuming v. Monro*, 8 T. R. 87. was, that the proclamation money being at one time of no value at all, the Court wished to ascertain its value at another time. But all this goes to the discretion of the Court ; and the doctrine, that the value of foreign money ought always to be ascertained by a jury, is contrary to the whole current of authority.

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

Vide
Bruce v.
Rawlins,
3 Wils. 61,
62.

March 7,
1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

Foreign judg-
ment.

Slade's case.

Coke, R.

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Consideration.

Vid. Plaistow

v. Van Uxem,

1 Doug. 5 n.

Interest.

As to the objection that *debt* cannot be maintained on a foreign judgment in assumpsit, the case of *Walker v. Witter*, 1 Doug. 1. is an authority for me on that point. But then it was said, the action in the foreign Court there was itself *debt*. What does it signify whether it was debt or assumpsit? The forms of the declarations are nearly the same, and Buller, J. says, in *Walker v. Witter*, that the old cases show that wherever indebitatus assumpsit is maintainable, debt is also: and he quotes *Slade's case*, Co. R. Neither is it necessary that the consideration of the foreign judgment should appear, though it does appear upon our declaration.

With respect to the count for interest, *Mr. Richardson* says, that a special contract ought to have been averred. But that is not necessary. It may be expressed or implied, and the practice is to state the matter as it really is, and it is sufficient if it appears that there is a contract. The forbearance of money is considered in the usury acts as a contract for interest, and the forbearance creates a contract. Hale's doctrine in *Seaman v. Dee*, 1 Vent. 198. would go the length of establishing that interest could never be recovered as such, but only by way of damages: and Lord Kenyon says, in *Herries v. Jameson*, 5 T. R. 553. that the reasons given for the doctrine go rather the other way.

The judgment therefore, I submit, ought to be affirmed on the whole declaration, or at least on some of the counts.

Mr. Richardson (in reply). I do not deny that debt may be maintained for any sum that may be liquidated; and, if the Plaintiff over-values, the

Jury may mitigate. *Mr. Littledale* says, that in some cases of foreign money the Court did not think it necessary to direct a writ of inquiry; but then there was an averment that so much was due in British money. The ground therefore was, that the Court knew the value, and did not want the assistance of a Jury. It is clear that a writ of inquiry may be directed in an action of debt, and it has been done in modern cases, as in *Blackmore v. Flemyng*, 7 T. R. 446.; and it has been held that it may be done in action of debt on specialty, in order to ascertain the interest, so that there is express authority that the writ may issue in actions of debt. As to the case of *Draper v. Rastall*, Cro. Jac. 88. a Jury intervened there, and the sum due was found in a formal way. But *Mr. Littledale* finds *dicta* in the ancient books that the Judges may themselves assess the damages. But that is only in cases of *mayhem*, and there the Court may fix the damages, *super visum corporis*. That however rests on a different principle from that upon which other cases depend. There are *dicta* also confining the discretion of the Judges to matters of mere computation. The observation of Wilmot, Ch. J. was a mere *obiter dictum*. As to the question of interest, it is true that the usury act states the forbearance of money as a consideration for interest: but it is not called a contract, and there is no case where it has been so called. It does not appear that the law always supposes that the forbearance of money due imports a contract to pay interest; and the authority of Hale in *Seaman v. Dee*, 1 Vent. 198. has not been over-ruled.

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

12 Anne,
st. 2. cap. 16.

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1817.

ERROR.—
DEBT.—FO-
REIGN JUDG-
MENT.—WRIT
OF INQUIRY.
—COSTS.

Judgment.
March 7,
1817.

Where errors are argued in Dom. Proc. without having been argued below, and the judgment is affirmed, though the alleged errors should be well worthy of consideration, the plaintiff in error pays the whole costs of the proceedings in D. P. as if the case had not been argued there at all.

The demand made in lawful money of Great Britain, and Defendant below had himself assessed the damages, and no occasion to send the matter to a jury. Interest.

Lord Eldon (C.) Although errors are brought before your Lordships, without having been argued in the Courts below, if there is error the Plaintiff in error is entitled to your Lordships' judgment. At the same time I repeat, not however stating it as at all reflecting upon either of the two most learned persons who have argued the case here, that this House always takes that circumstance into consideration, not so as to influence its judgment with respect to the case itself, but with reference to our practice as to costs. For if a party suffers his cause to pass without argument through the Courts below—and the question here was well worthy of their attention—and assigns his errors only two or three days before the cause is brought to hearing in this House, he must, by our practice, pay the costs of the proceedings here.

With respect to the case itself my opinion is, that, as the errors have been argued on the part of the Plaintiff in error, they have not been established. I think the demand was made in lawful money of Great Britain, and that the defendant below himself assessed the amount, and there was no occasion to send the matter to a jury. And as to the point of interest, I think that sufficiently laid in the declaration to imply a promise to pay, and that, on that point also the Defendant in error is entitled to your Lordships' judgment. I propose, therefore, that we should give judgment, as if the case had not been argued in this House at all, that is, to give the Defendant in error his costs of the proceedings here.

*Judgment affirmed, with 140*l.* costs.*

Judgment at the same time affirmed in another cause (not argued) of the same nature, relating to the same subject, and between the same parties, with 140*l.* costs.

March 7,
1817.

ERROR.—
DEBT.—FR.—CO
REIGN JURIS-
DICTION.—WRIT
OF INQUIRY.—
—COSTS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BAYNE—*Appellant.*

FERGUSON and KYD—*Respondents.*

B., F., and K. become copartners in a joint adventure in land. A third person (Lord L.), for whom K. is factor, is anxious to purchase a part of the copartnership land called Hilton, at 19,441*l.*, and applies to certain monied relations to furnish him with the means of effecting the purchase. B. is aware of the anxiety of Lord L. to purchase Hilton, but K. does not communicate to B. the steps taken by Lord L. with that view. F. (K. concurring) persuades B. to agree to offer the lot to Lord L. at 19,000*l.*, in order to bring him to a decision; and B. and F. offer it at that price to K., who accepts it for himself without any objection made by his co-partners. B. however, understanding the offer and acceptance to be for Lord L., Lord L. does not accept the offer at that time, and K. sells the lot at 19,000*l.* to F. without any communication with B.—F. sells pieces of the lot to M. and Lord L., without any interference by B., and then sells the remainder to Lord L. at a price which makes up for the whole lot the sum of 22,311*l.*, instead of 19,000*l.* B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at 19,000*l.* was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of these profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the Defenders, affirmed above, but without costs.

March 24, 26;
June 23,
1817.

CO-PARTNERS.
—CONCEAL-
MENT.—
FRAUD.

March 24, 36; The Lord Chancellor and Lord Redesdale being of opinion
 June 23, that, although the circumstances might raise a suspicion
 1817. of unfair dealing, B. by his own conduct in not interfering
 at all with the sales by F. of pieces of the lot to M.
 and Lord L. taken in connexion with his conduct at the
 time of the offer to and acceptance by K., was precluded
 from the relief which he prayed.

CO-PARTNERS.
 —CONCEAL-
 MENT.—
 FRAUD.

THE Appellant had brought this action against the Respondents to recover a share of certain profits made upon a joint adventure in land, from which his co-partners had, unjustly as he alleged, attempted to exclude him.

August, 1808.
 Estate pur-
 chased by Re-
 spondents.

In the beginning of August 1808, the Respondents, Messrs. Kyd and Ferguson, purchased the estate of Carselogie, in Fife, from Sir John Hope's trustees at the price of 44,000*l.*, payable by instalments, 10,000*l.* at Candlemas, 1809; 10,000*l.* at Martinmas, 1809, and the remaining 24,000*l.* at Martinmas, 1811. Before this purchase took place, Lord Leven, to whose property a lot of the estate called Hilton lay contiguous, was very anxious to purchase that lot separately, and directed Kyd, who was his factor, to consider the value of Hilton, and state his opinion upon it. Kyd, in a letter to his Lordship, dated the 14th July, 1808, stated that he thought Hilton worth 19,332, but that they asked 19,850, and that it was not worth while to break off for 500*l.* on such a purchase. This projected separate purchase, however, did not take place; and then Kyd and Ferguson resolved to purchase the whole estate as a speculation, Lord Leven agreeing to take Hilton off their hands. It was expected that the whole might be purchased for

43,000*l.*, in which case Lord Leven was to take Hilton at 19,000*l.* The price of the whole being 44,000*l.*; the proportion for Hilton was raised to 19,441*l.*, and then Lord Leven, who, without objecting to the account of the price, became apprehensive that he could not provide the money to pay it, expressed to Kyd his desire to be relieved from his engagement. Messrs. Kyd and Ferguson consented; and notice being given that Hilton was to be sold, the Appellant, Bayne, came forward and offered 18,500*l.* for it. The Respondents would not accept that sum, but offered it at 19,000*l.*, which Bayne refused to give. Then it was proposed to Bayne, or by him (for it was stated one way in the one case, and the other way in the other), that he should become a partner in the adventure, and on the 6th or 8th of August, 1808, he was admitted a partner accordingly.

March 28, 26;
June 23,
1817.

CO-PARTNERS.
—CONCEAL-
MENT.—
FRAUD.—

It appeared by a letter from Lord Leven to Kyd, dated 4th August, 1808, that his Lordship had not then abandoned all thoughts of purchasing Hilton, though he had been desirous of being released from the obligation; and on the 11th August, 1808, his Lordship wrote to Kyd, that in the belief that he might still have the refusal of Hilton, he had written to Messrs Thorntons (bankers, London, relatives of his Lordship) to ascertain whether they would assist him with the two first instalments, if not the whole sum, to enable him to make a purchase every way desirable for him; and, on the 13th August, his Lordship wrote to Kyd that the plan and valuation (made by Kyd as above, 14th July, 1808) were before the Thorntons; and that if they listened to the proposal, it would be cruel to be disappointed.

August 6, or
8, 1808. Ap-
pellant ad-
mitted as a
partner.

March 24, 26;
June 23,
1817.

CO-PARTNERS
—CONCEAL-
MENT.—
FRAUD.

On the 15th August, 1809, about a week after the Appellant had become a partner, he was, in the course of a conversation with the Respondent, Ferguson, informed, in general terms, of Lord Leven's anxiety to purchase Hilton, but was not then informed that the plan and old valuation had been laid before the Thorntons. In the course of that conversation it was agreed between Bayne and Ferguson, that Hilton should be offered to Lord Leven at 10,000*l.*, Bayne being informed by Ferguson that Kyd was of the same opinion; and the following memorandum or missive was written out by Ferguson, and signed by him and Bayne, and addressed by Ferguson to Kyd.

Missive or offer, August 15, 1808.

"It is our opinion, that Hilton should be sold, with its proportion of freehold affecting to the rent, for 10,000*l.*; the price to be payable as follows, viz. 3000*l.* at March 1809, and the balance at the time of the last payment to Sir John Hope; reserving our right to straighten marshes, on receiving land for land, quantity and quality considered. This offer to be binding for a week from this date; Cupar, 15th August, 1808. (Signed) JOHN FERGUSON, WILL. BAYNE. Cupar, 15th August, 1808."

On the day following, Mr. Kyd returned an acceptance in these terms: "Cupar, 16th August, 1808. Messrs Bayne and Ferguson,—Your offer of Hilton of yesterday I accept, and am, Gentlemen, your most obedient servant. (Signed) JAMES KYD."

It was admitted, on all hands, that this offer was made with a view to a sale of the property to Lord Leven, though Kyd accepted it as if made to himself. Bayne did not at that time object to this ac-

ceptance, conceiving, as he afterwards alleged, that Kyd was acting in the affair merely as the agent of Lord Leven. His Lordship did not take advantage of that offer; and, on the 19th or 20th August, 1808, Kyd applied to Ferguson to purchase the lot at 19,000*l.*, which Ferguson agreed to do. No intimation of that transaction was given at the time to Bayne. On the 22d of August, Ferguson sold a small portion of Hilton to one Martin; but the minute of sale was subscribed by Kyd instead of Ferguson, which was accounted for by the circumstance that at that period the whole estate was vested in Kyd, to whom alone the conveyance had been made. About ten acres of Carslogie, not included in Hilton, were at the same time sold to Martin, and about that part of the transaction Bayne was consulted. On the 24th August, 1808, Ferguson sold thirty acres of Hilton to Lord Leven. These sales of Hilton were publicly known; but Bayne did not at all interfere in them, nor was he consulted respecting them.

March 24, 1808;
June 23,
1817.

CO-PARTNERS.
—CONCEAL-
MENT—
FRAUD.

Sales of Hil-
ton by F. in
which B. does
not interfere.

In October, 1808, Lord Leven again intimated to Kyd his anxiety to purchase the remainder of Hilton; and, on the 11th Nov. 1808, he did actually purchase it, at a price which made up, for the whole of Hilton, the sum of 22,811*l.*, instead of 19,000*l.* at which it had been offered in the missive to Kyd.

Bayne insisted that he was entitled to a share of the profits, derived from this increased price; and on the 3d May, 1809, brought an action against Ferguson and Kyd to compel them to pay him that share, contending that it was evident, from the circumstances, that the missive of the 11th August,

Action.

concluded
the case.

June 23, 1817.

CO-PARTNERS.
—CONCEAL-
MENT.—
FRAUD.

ther person, whether that other person completed his contract or not, he would be bound to take it, if the other partners chose that he should be so bound.

Lord L. did not take advantage of the offer, and then Kyd sold the property to Ferguson for 19,000*l.*, and Ferguson says, that he was a *bona fide* purchaser at that price. But by sale of a small part of the property to one Martin, and another small part, and afterwards the residue, to Lord Leven, it turned out that a profit of between 3000*l.* and 4000*l.* was made of it beyond the sum of 19,000*l.*; and then Bayne insisted, that the transaction of the missives was affected by concealment and management on the part of the Respondents in such a manner that it could not, consistently with the law of partnership, exclude him from his share of the profit made by the sale of this property which formed, if I may so call it, a part of the partnership stock. I cannot disguise from your Lordships that when the cause was heard, whether the circumstances would authorize a judicial opinion to that effect or not, I could not avoid entertaining a good deal of suspicion that all was not so fair as it should be on the part of the Respondents. Such having been the impression on my mind, it became my duty carefully to consider whether that impression was well founded. I have carefully and repeatedly considered this case, and, upon the whole, I am of opinion that, connecting the missive and acceptance with the conduct of Bayne after Ferguson was acknowledged as the owner, this is a case in which the Appellant, whatever may be the real character of the proceedings of the Respondents, is precluded by his own acts from

having the relief which he now claims on the ground of fraud and concealment. But, on the other hand, it is impossible for me to dismiss certain reflections from my mind, so as to leave me at liberty to advise your Lordships to give costs.

June 23, 1817.

CO-PARTNERS.
—CONCEAL-
MENT.—
FRAUD.

Lord Redesdale. I entirely concur in what the noble Lord has said. A., B., and C. unite as partners in an adventure. A. and B. make an offer to C. as attorney for a stranger, D.; and C., without informing his partners whether he had made the offer to D., chooses to take it as an offer to himself. A. concurs in that, but B. does not. If the case stood there, the decision would clearly be wrong. I have scarcely a doubt that the transaction was fraudulent on the part of the Respondents; but Bayne has, by his own conduct, precluded the relief which he claims. I have thought it right to say this much, because with reference to the general principle the Judgment below would be wrong.

Judgment *affirmed*, without costs.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEDDES—*Appellant.*

PENNINGTON—*Respondent.*

G. purchases from P., a horse-dealer, a horse warranted "a thorough broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold,

June 9, 1817.

June 9, 16,
1817.

WARRANTY.
—MISREPRE-
SENTATION.

by a gentleman from England. For about two months from the time of the purchase G. himself has no opportunity to drive the horse in a gig, but during that interval the horse is often driven in a gig by others, and performs well. Then G. himself, on two occasions, drives the horse in a gig, on both of which occasions the horse performs ill, kicking out behind and running forcibly to the side of the road, and at one time overturning the gig in a ditch. P. refusing to take back the horse, G. brings his action for the price and damages. It appeared in evidence that P. had got the horse from a Mr. A. of Leith, who parted with him on account of his having, on one occasion, when driven in a gig, without any apparent cause, kicked out violently behind and broke the gig. But it was also proved that the horse, while in the possession of A., of P., and of G. himself, as above mentioned, had been very often driven in a gig, and on these occasions found steady and safe. It was in evidence likewise that G. had lashed the horse and checked him at the same time, on the occasion when his gig was overturned. No other evidence was given as to G.'s experience or skill in driving. Judgment below for P. the horse-dealer, a majority of the Judges being of opinion upon this evidence that the horse did answer the warranty at the time he was sold, and that his bad demeanor in the hands of G. was owing to want of skill in the driver; and, the Lord Chancellor being of that opinion, the Judgment was affirmed above, but without costs.

The Lord Chancellor observing, that, if the horse answered the warranty at the time he was sold, the misrepresentation as to the place from which he came would not invalidate the sale; but that it was a material circumstance with respect to the question of costs.

Warranty.

THE Appellant having purchased a horse from the Respondent, a horse-dealer in Glasgow, received from him the following warranty, dated 6th May, 1811: "Sir, I have this day received from your son, Mr. Archibald, 84*l.* sterling, the price of my dark bay horse sold you; I warrant this horse sound, free from vice and every blemish; he is quiet in harness and sure-footed, and a thorough

"broke horse for either gig or saddle." The Appellant kept the horse two months, and then applied to the Respondent to take him back again, alleging that he did not answer the warranty, not being a proper horse for a gig; and, upon the Respondent's refusal to take back the horse and return the price, the Appellant brought his action before the magistrates of Glasgow for the price and damages. The Respondent having answered that the horse did satisfy the warranty, a proof was allowed, and the amount of the evidence was this:

June 9, 18,
1817.

WARRANTY.
— MISREPRESENTATION.

The Respondent had represented to the Appellant, at the time of the purchase, that the horse had been sent to him by a gentleman from England, with instruction to sell him, whereas in point of fact the Respondent had purchased him at 60*l.* from a Mr. Anderson of Leith Walk Foundry. Mr. Anderson had bought the horse for the purpose of running him in a gig, and was well satisfied with him for some time; but at the end of about two months from the time when Anderson had purchased him, while walking with the gig slowly down a hill, he, without any apparent cause, kicked out behind and broke the foot-board to pieces, then galloped furiously down the hill, and on turning an angle sharply the gig was upset. When Anderson sold the horse to the Respondent he distinctly mentioned the accident, and told him that from that circumstance he considered the horse as unfit for a gig; but that he would answer well for double harness or as a riding horse. The Appellant had been employed for two months after purchasing the horse from the Respondent in such a manner that he had no opportunity himself to drive the horse in a gig.

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1817.

WARRANTY.
— MISREPRE-
SENTATION.

But when he did so employ him, the horse on one occasion kicked and plunged violently, and on another occasion, while going down hill, he started on passing a cart, upon which the Appellant whipped and checked him at the same time; the horse then went off at a canter, ran to the side of the road, and overturned the gig in a ditch. It appeared however that in the interval between the time when the Appellant purchased the horse and the above-mentioned occasions, the Appellant's children and others had gone out in a gig drawn by this horse, and that the horse had then been perfectly steady and safe; and it was also proved that the horse, while in the Respondent's possession, had been often driven in a gig, both up and down hill, and on a level road, and had always on these occasions performed well. There was no evidence to show that the Appellant had experience or skill in driving.

Interlocutors.
Dec. 9, 1813;
Jan. 11, Feb.
1, 24, May 19,
June 24, 29,
1814.

The magistrates of Glasgow were of opinion that the horse was not a proper one for a gig at the time he was sold, and decided in favour of the Appellant; but the cause having been brought by advocacy before the Court of Session the Lord Ordinary and the Court gave judgment for the Respondent with 215*l.* costs; three Judges out of five, being of opinion that the bad demeanor of the horse, when driven by the Appellant, was owing to want of skill in the driver. From this Judgment Geddes appealed.

With reference to the time that elapsed before the horse was returned, and in order to show that in England it was held sufficient if the horse was returned in a reasonable time, or as soon as conveniently might be, after the defect was discovered, the cases of *Fielder v. Starkin*, 1 H. Black, 17.—*Adam*

v. Richards, 2 H. Black, 573.—*Buchanan v. Parnshaw*, 2 T. R. 745.—*Curtis v. Hannay*, 3 Esp. R. 82, were cited.

June 9, 16,
1817.

WARRANTY.
—MISREPRE-
SENTATION,
Judgment.
June 16,
1817.

Lord Eldon (C.) In this case, which is certainly somewhat difficult to deal with, it is stated that a sum of 215*l.* has been awarded as the costs of one of the parties, and the question is no more than this, whether a horse answered the warranty given by Pennington to Geddes in this letter, in which he says, “ I have this day received from your son Mr. Archibald 84*l.* sterling, the price of my dark bay horse sold you : I warrant this horse sound, free from vice and every blemish. He is quiet in harness and sure-footed, and a thorough broke horse for either gig or saddle.” Warranty.

It has been admitted on all hands that the horse was sound, and free from vice, except as afterwards mentioned ; and that he was quiet in harness if along with another horse. But the question is, what was the demeanor of this horse in a gig. My noble predecessor could have better dealt with this case ; and I wish it had fallen to his lot, and not to mine, to advise your Lordships in the decision of it. But as it is, I must deal with it as well as I can.

It seems that three of the Judges below were of opinion that this was a good horse for a gig. And one of them said that it was very indiscreet to whip a horse and check him at the same time, and that in his judgment the whip ought to have been applied to the man rather than to the horse. Pennington had represented that this was one of two horses sent to him from England to be disposed of, which was not the fact. One of the Judges says that this was no-

Misrepresentation.

June 16,
1817.

WARRANTY.
— MISREPRE-
SENTATION.

thing at all; and I agree with him so far, that, if the warranty is answered, a misrepresentation as to the place from which the horse was procured will not suffice to set aside the sale. But then the misrepresentation may be a material consideration with respect to costs. Another Judge seems to think that, on account of this misrepresentation, Pennington could not successfully defend the action. That I conceive not to be correct if it is made out that the horse answered the warranty.

The Appellant kept the horse two months. I have not had experience of late in courts of law; but I understand that, in this country, the time within which a horse ought to be returned in cases of this kind depends very much upon the period when the defect is discovered.

But the principal question here is, whether the accident was owing to vice in the horse, or want of skill in the driver. And as to that, I think that the three Judges below were right. But still it is a doubtful case, and on that account, it may be improper to give the Respondent the costs of the appeal; and another reason for not giving costs is, the improper misrepresentation, for the object of it must have been to prevent inquiries which might lead to the rejection of the horse. But that misrepresentation will not invalidate the transaction if the horse was a fit horse for a gig at the time he was sold. I propose therefore to your Lordships to leave the matter as it is, without giving costs to either side. My noble friends concur with me in this view of the case.

Lords Red-
dale and
Erskine.

Judgment affirmed. No costs on either side.

ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

BURDETT (Bart.)—*Plaintiff in Error.***ABBOT** (Speaker, H. C.)—*Defendant in Error.*

AND

BURDETT (Bart.)—*Plaintiff in Error.***COLMAN** (Serjeant at Arms)—*Defendant in Error.*

To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the Plaintiff (the outer door being shut and fastened), and arresting him there, and taking him to the Tower of London, and imprisoning him there: it is a legal justification to plead that a Parliament was held which was sitting during the period of the trespasses complained of: that the Plaintiff was a member of the House of Commons: and that the House having resolved, "that a certain letter, &c. in Cobbett's Weekly Register, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House, and that the Plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered that, for his said offence, he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the Defendant as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest the Plaintiff, and to commit him to the custody of the Lieutenant of the Tower: and issued another warrant to the Lieutenant of the Tower to receive and detain the Plaintiff in custody during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the Plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose and demand made of admission, he,

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by the assistance of the said soldiers, broke and entered the Plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody under the other warrant by the Lieutenant of the Tower.

And to a similar action against the Serjeant at Arms, a similar plea, with variations, however, adapted to his situation, is a legal justification.—(*Vid.* 14 East. 163.)

The Lord Chancellor considering it as clear in law that the House of Commons have the power of committing for contempt, and that this was a commitment for contempt.—(Lord Erskine concurring.)

FIRST CAUSE.

THIS was an action of trespass by Sir F. Burdett against the Speaker of the Commons. The declaration was as follows.

Declaration.
1st Count.

Sir Francis Burdett complains of the Right Honourable Charles Abbot (having privilege of Parliament) of a plea of trespass; for that the said Charles heretofore, to wit on the 6th April, 1810, and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered a certain messuage of the said Sir Francis, situate in the parish of St. George, Hanover-square, in the county of Middlesex; and on one of those days, to wit on the 9th of April, in the year aforesaid (the outer door of the said messuage being then, and there shut, and fastened), with divers soldiers, and men armed with offensive weapons, forcibly, and with strong hands, broke open a certain window, and two window-shutters of and belonging to the said messuage of the said Sir Francis, and through the same broke

That Defendant broke into Plaintiff's house (the outer door being shut and fastened) with soldiers, &c. and made a noise in the house, and

into and entered the said messuage, and made a great noise, disturbance, and affray, in the said messuage: and with force and arms made an assault on the said Sir Francis, and laid hands upon him, and forced and compelled him to go from and out of his said messuage, into a certain public street there, and also then and there forced and obliged him to go into a certain coach, in, and through, and along divers other public streets and highways to a certain prison, called the Tower of London, and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever for a long space of time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis: whereby, he, the said Sir Francis, during all the time aforesaid was, and still is hindered from transacting his lawful affairs, &c. to wit at the parish aforesaid and county aforesaid. **AND** also for that the said Charles heretofore, to wit on the day and year last aforesaid, with force, and arms, &c. made another assault upon the said Sir Francis, to wit at the parish, &c. and then and there seized and laid hold of the said Sir Francis with violence, and forced and compelled him to go in, through, and along, divers public streets to a certain prison, called the Tower of London, and then and there imprisoned the said Sir Francis, and kept and detained him in prison there without any reasonable or probable cause whatsoever, for a long space of time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis, whereby, &c. **AND** also for that the said Charles heretofore, to wit on

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assaulted
Plaintiff, and
compelled
him to go to a
prison.

And there im-
prisoned him
without rea-
sonable cause.

2d Count.

2d Count.

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the day and year last aforesaid, with force and arms, &c. made another assault upon the said Sir Francis, to wit at the parish aforesaid, &c. and then and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis. There was a fourth count for a common assault.

1st. Plea.
General issue.
2d Plea.
Justification.

The Defendant pleaded, *first*, not guilty, to the whole trespasses charged. And *secondly*, he justified the breaking and entering of the Plaintiff's house by the proper officer (whilst the outer door was shut and fastened), for the purpose of arresting and imprisoning the Plaintiff, under the Speaker's warrant of commitment, for a breach of the privileges of the House of Commons, after audible notification of the purpose, and demand of admission, without effect: and the subsequent arrest and imprisonment of the Plaintiff, in execution of such warrant, stating that a Parliament was held, and was sitting at the time of the trespasses complained of, and that he, the Defendant, and the Plaintiff, were members of the Commons House of the said parliament; that the House resolved, "that a letter

Resolution.

"signed, 'Francis Burdett,' and a further part of
"a paper entitled, 'Argument,' in Cobbett's Weekly
"Register, of March 24, 1810, was a libellous
"and scandalous paper, reflecting on the just rights
"and privileges of that House; and that Sir
"Francis Burdett, who had admitted the letter
"and argument to have been printed by his autho-
"rity, had been thereby guilty of a breach of the

“privileges of that House;” and it was thereupon ordered by the House “that the Plaintiff be for his said offence committed to the Tower; and that Mr. Speaker do issue his warrants accordingly;” that the Defendant being such Speaker, in pursuance of the resolutions and order aforesaid, issued his warrant, reciting the resolution and order of the House to the Serjeant at Arms to arrest the Plaintiff, and deliver him to the custody of the Lieutenant of the Tower; such warrant requiring all peace officers and others to assist in the execution thereof; which warrant was delivered to the Serjeant at Arms to be executed in due form of law; that he, as such Speaker, issued another warrant, reciting the resolutions and order of the House to the Lieutenant of the Tower, therefore requiring “that the said Lieutenant of his Majesty’s said Tower, or his deputy, should receive into his custody the body of the said Sir Francis Burdett, and him safely keep during the pleasure of the said House:” which warrant was delivered to the said Lieutenant to be executed in due form of law; that the Serjeant at Arms went to the Plaintiff’s house, where he then was, to execute the warrant, and with an audible voice notified his purpose, and demanded admittance to execute his warrant; and, because the outer door was kept shut and fastened against him, and was refused by the Plaintiff to be opened, he, with the assistance of soldiers and armed men, broke into the house and arrested the Plaintiff, and conveyed him to the Tower, in execution of the first mentioned warrant; that the Lieutenant of the Tower received and detained the

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Order.
Warrant to
arrest.

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Arrest.

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Plaintiff there, by virtue of the last mentioned warrant, &c. There was a third plea, the same as the second, only omitting to justify the breaking open the door, and, at the conclusion of this plea there was a traverse of guilty in any other manner than by the making, signing, issuing, and delivering, of the said warrants as such Speaker as aforesaid, in pursuance of the resolutions and order aforesaid, in manner and form as is in this plea before alleged, &c.

Replication.
Demurrer.

The Plaintiff joined issue to the country on the first plea of not guilty, and demurred generally to the second and third pleas; and the Defendant joined in the demurrers. Judgment, in E. T. 1811, for the Defendant.

SECOND CAUSE.

Action against
Serjeant at
Arms.

There was another action against Colman, the Serjeant at Arms. The declaration was in trespass for an assault and false imprisonment of the Plaintiff, by the Defendant, acting in execution of the Speaker's warrant, and the form of the counts was the same as in the action against the Speaker.

Pleas.

The pleas also were, like those in the former action, the general issue of not guilty, and two special pleas of justification; the one justifying the arrest and imprisonment of the Plaintiff, under the Speaker's warrant, and the breaking of the house, the outer door being shut and fastened against the officer, for the purpose of executing such warrant, and the execution of it by the assistance of soldiers and armed men; the other similar to it, only omitting to justify the breaking of the house; the

only difference between the justification pleaded by this Defendant, and that pleaded by the Speaker, being that these justificatory pleas contained a distinct allegation, that the Defendant at the time of the trespasses complained of, was Serjeant at Arms of the House, and omitted so much of the former pleas as related to the warrant addressed to the Lieutenant of the Tower.

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The Plaintiff, after joining issue to the country on the plea of not guilty, instead of demurring as before, replied specially to the second plea, that the Serjeant at Arms executed the warrant by breaking the Plaintiff's house and arresting him *"with a large military force of our said Lord the King, then and there armed with dangerous and offensive weapons, to wit, &c. the same military force being then and there used by him the said Francis John, against the said Sir Francis, in and for the execution of the said first mentioned warrant in the same plea mentioned, and with such military force so armed and used as aforesaid, as was improper, excessive, and unnecessary, for that purpose, &c., and in an unreasonable manner, and more violently than was necessary or proper," &c.* There was a similar replication to the third plea, omitting the breaking and entering the house.

Replication.

Military force.

The Defendant rejoined to the replications to the second and third pleas, taking issue on the excess, and issues were joined on both these rejoinders.

The cause was tried at bar before the Court of King's Bench, in E. T. 1811, when a verdict was found for the Plaintiff on the general issue, and

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Writs of
Error.

for the Defendant on the two other issues; and judgment was given for the Defendant.

The Plaintiff brought his writs of error in the Exchequer Chamber, assigning for error in both cases that the justificatory pleas were not sufficient in law to bar the action, and that judgment ought to have been given for the Plaintiff, or a *venire de novo* awarded to try the first issue. The judgments having been affirmed in the Exchequer Chamber, in E. T. 1812, the Plaintiff brought writs of error in *Dom. Proc.* assigning the same errors. The verdict in the second cause, it was alleged, had only negatived the fact of excess of military force, and the question of law still remained, whether it was lawful to employ a military force without a necessity, and the circumstances from which it arose, stated in pleading.

Mr. Brougham, for Plaintiff in error (after stating the pleadings generally). I am relieved from much of the argument, not only by the fulness of the discussions below, but also by the admissions of the Judges, which amount to a recognition of the fundamental principle contended for by the Plaintiff, viz. that where another matter comes before a court of law, and a question of privilege arises incidentally, the Court must deal generally with the question of privilege. But it is said that when the House of Commons has resolved that a publication is a libel and a breach of privilege, and has committed the individual, and an action is brought, and the resolution and order of commitment are pleaded, the Court cannot call on the House of

Commons to set forth the alleged libel, that it may judge whether it is a libel or breach of privilege. I mean to contend that courts of law, if they deal with questions of privilege at all, must go to the full extent.

That courts of law have some jurisdiction over these questions of privilege appears from the case of *Donne v. Walsh*, 4 Pryn. Parl. Writs, 743. in which the Court not only took cognizance of privilege of parliament, but decided against the privilege claimed for the members, of not being impleaded during the sitting of parliament: and also from the case of *Rivers v. Cossins*, 4 Pryn. Parl. Wr. 755, in which the Court of Exchequer, with the advice of all the other judges, agreed that a member might be impleaded, though, as appears from *Atwell's case*, Rot. Parl. No. 35. the House of Commons still persisted in their claim of exemption from being impleaded. But in the next claim of privilege, *Roo v. Sadcliffe*, 1 Hats. 51. the claim was confined to freedom from arrest or imprisonment, the exemption from being impleaded being given up. In these cases the House of Commons proceeded by writ of *supersedeas*.

There are other cases in which the courts examined whether the privilege claimed really existed, as in the cases of the *Duchess of Somerset v. Earl of Manchester*, 4th Pryn. Reg. 1214.; and *Benyon v. Evelyn*, 14 Car. 2. Roll. 2558. It is well known that the celebrated judgment of Sir Orlando Bridgeman, in the latter case, is in favour of my argument. He says, "that resolutions or votes, in either House of Parliament, in the ab-

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Jurisdiction of
courts of law,
in questions of
privilege of
Parliament.
Donne v.
Walsh.

Exch. of
Pleas.
12 Ed. 4.

Atwell's case.
17 Ed. 4.
5 vol. Rolls,
Parl. 131.
Hat. 48.—
Roo v. Sad-
cliffe, 1 H. 7.
Parl. Roll.
104.

Duchess of
Somerset, v.
Earl of Man-
chester,
16 Car. 2.—
Benyon v.
Evelyn,
14 Car. 2.—
1 Show, P. C.
Oarth. 137.

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Admissions.

14 East. 128.

sence of the parties concerned, are not so con-
clusive in courts of law; but we *may*, with due
respect, notwithstanding these resolutions, say
we *must* give our judgment according, as we
upon our oaths, conceive the law to be, though
our opinion shall fall out to be contrary to those
resolutions or votes of either House." In the case
of the *King v. Knollys*, Lord Holt says, "but
admitting that it," viz. *lex parliamenti*, "were a
particular law, yet if a question arise determinable
in the King's Bench, the Court of King's Bench
must determine it;" and then he cites *Benyon's*
case. This is admitted by the Counsel for the De-
fendants, and by the Judges, particularly by the
Chief Justice of the King's Bench. An extreme
case had been put, and such may be properly put
in a question like this *inter apices juris*. Suppose
the House of Commons were to direct the Speaker
to issue his warrant to put a man to death. The
Chief Justice says, "the question in all cases
would be whether the House of Commons were a
court of competent jurisdiction for the purpose of
issuing a warrant to do the act. You are putting
an extravagant case. It is not pretended that the
exercise of a general criminal jurisdiction is any
part of their privileges." And then he says, not
blinking the question, "When that case occurs,
which it never will, the question would be,
whether they had general jurisdiction to issue
such an order, and no doubt the courts of justice
would do their duty;" and that cannot be denied
if there remains any settled law in the country. He
afterwards says, after stating the opinions of Wright

and Dennison, justices, in Murray's case: "I agree with Wright, and Dennison, that it need not appear what the contempt was; but I am not prepared to say, with them, that we could in *no* case judge of it, or that there might not appear such cause of commitment as, coming collaterally before the Court in the way of a justification pleaded to an action of trespass:" the way in which this question comes—"the Court might not be obliged to consider and to pronounce to be defective." This distinction, by the way, between a question coming directly and coming collaterally before the Court is one which we take in our argument. The Chief Justice afterwards says, "but if it" viz. the House of Commons, "did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say that in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require."

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Murray's case,
1 Wils. 299.
14 East. 148.

14 East. 150.

These may suffice as to the concessions in point of principle, admitted also by the Defendant, and the course of defence which he has adopted. If the House of Commons, which for the purposes of this argument I may identify with the Defendants, had pursued a consistent course, they would have said, this is a matter of privilege which we alone are

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competent to determine. We will not answer any charge, we will not appear, much less plead to any action, because, if we do, we are compelled to put our privileges before the Court below. But they have taken another course, and involved the matter in inextricable difficulty. Whether the individual has been rightly punished is a question which they refuse to try; but the question they raise is, whether the Commons' House of Parliament has privilege, or a certain class of privileges. What has happened upon this? The Court of King's Bench has considered the subject of privilege, and decided in their favour: and the judgment has been affirmed in the Exchequer Chamber, and now the matter is brought here; so that the House of Commons, which denies that the courts of law can determine upon a question of privilege, carries the question through all the courts, and now before the other House, whose supremacy is denied, except as to the precedence of individual members. It is something in a question of this kind *inter apices juris* to show that every step they take leads to absurdity.

It is admitted then that courts of law may discuss and decide whether a general class of privileges belongs to the House of Commons or not; that they may discuss whether the House has the power to commit for all contempts, for all breaches of privilege, for all libels. And I may go a step farther, and take it from the admissions, that the resolution of the House of Commons is not in all cases conclusive, that such a class of acts is a breach; and if so, the courts must deal with the question, not

only whether the House has the class generally, but must inquire into the particular case, so far at least as to enable them to judge whether it is right in the House of Commons to claim the class. The House of Commons at one time claimed for its members and their servants the privilege of being exempt from being impleaded, which was denied by the courts. Suppose that claim were revived, the courts would deny it. And if, on the face of a warrant of commitment, any thing should appear obviously absurd, or contrary to law, or beyond the jurisdiction of the House of Commons, as that a person was committed because he trespassed on the fishery of a member of parliament, a case not likely to have occurred, but which did occur; or that A. B. and C. D. should be put back to back on a horse, and, with a label specifying the offence, ride in this manner round Charing Cross, which also did happen; or, which did not happen, if the House of Commons should order A. B. to be put to death; if these things should appear on a return to a writ of *habeas corpus*, the Court would take cognizance of the case, and give relief or redress. This follows from the admissions. Another conclusion from the admissions is, that privilege is not so delicate a subject that it must not be mentioned out of doors, and that the courts have dealt with them sometimes rather roughly. Then if the courts would so deal with them, on account of any thing appearing on the face of the warrant, it would be manifestly absurd to say that the Commons could defend by involving themselves in obscurity. If it is possible that the Court would deny the claim, if it appeared

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Grounds on
which it is
contended
that the H. C.
has the power
to determine
what is a libel,
and to punish
by imprison-
ment.
Necessity.

on the face of the warrant and return, then the particular matter must be set forth, lest the House of Commons should do that, *per indirectum*, which they could not do directly.

I now come to inquire into the grounds on which it is contended that the House of Commons have the privilege now in question, of determining whether a particular act amounts to a libel, and such a libel as entitles the House of Commons to punish by imprisonment. They say that it is necessary for self-protection, to enable them to perform their functions, and to remove obstructions; and that this can be effected in no other way than this, that the House itself should have the power to punish; and it is relied on that the House of Commons is a court of record. That the House of Commons is not a court of record I shall afterwards show. At present I apply myself to the question of necessity generally. And, first, if it be inconvenient that they should not have this power, the inconvenience is not all on one side. There is no redress against their wrong, no impeachment against them, nor can any of their members be questioned in any other court for what he has done in parliament. That is not the case with the courts below. Their judgments are liable to be reversed, not, I admit, in cases of contempt. But then, if the judges abuse the power, they are cognizable in another way: they may be impeached; they may be removed by address of the two Houses of Parliament; and before the Revolution they might be removed by the Crown; so that the House of Commons is above controul, the judges are not. Besides, the courts proceed by

known forms, and the accused is heard on the same terms as the accuser. But in the House of Commons the accused is judged in his absence. A vague accusation is preferred. The accused is heard and ordered to withdraw; and then, after he is withdrawn, the greater part of the charge is brought forward against him; and then they give judgment, and execute it by their own officers. The prerogatives of the Crown are defended in the courts, and its servants have no privilege in that respect more than any other subject. Where, then, would be the inconvenience, though the House of Commons should be compelled to say yea or nay to the particular charge, when they admit that they are bound to answer generally? No inconvenience would result from it, except by a failure of the Court to do them justice, and then error might be brought. But the judgment might be affirmed in the House of Lords. I say it is not in their mouths to use that argument; for they accuse us of putting extreme cases. And besides, I can show that the abuse on their part has existed, while no instance can be shown in which the courts have been remiss in maintaining their privileges; and this leads me to the authorities on which the claim rests.

They rely upon an uninterrupted train of precedents, a long course of practice, and the enjoyment of the right. Now the earliest case of commitment for libel on the whole House is that of Hall, in the 23d of Eliz. 1 Hats. 93. He was imprisoned, fined, and expelled. The commitment was for six months, and further, till a revocation and retraction of the slander. But as this was thought too inde-

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Authorities.—
Precedents
from Journals,
&c.

Case of Hall,
D'Ewes
Journ. 291.
4 Inst. 23.

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Clar. Hist.
Rebel. vol. i.
212.

finite, they added, after sentence, such a retraction as should satisfy six members, &c. So much for this doctrine of privilege, which is to be used only as a shield against the crown and the subject. Then there is a *hiatus*, and this uniform stream of decision stops for three-fourths of a century. And then come the long parliament privileges, which I suppose will not be quoted as precedents. They called any power they chose to assume a branch of their privileges. They assumed the King's authority over the army, and made use of it against his person; and whoever questioned their power was dealt with as Hall was.

Then came the case of Pitman, and the riding round Charing Cross, for arresting a member's servant in violation of a privilege not now claimed. It appears that after the Restoration the same notion of privilege prevailed in the House of Commons. I refer to the proceedings of the two Houses with respect to the case of *Shirley v. Fagg*, upon the occasion of an appeal from the Court of Chancery to the House of Lords, by Dr. Shirley against Sir John Fagg, a member of the House of Commons. A multitude of conferences took place. The House of Commons maintained that the appeal was a breach of their privileges, and denied that appeals lay from courts of equity to the House of Lords. They imprisoned the serjeants and barristers who had, contrary to an order of the House of Commons, pleaded for Crispe in an appeal by Crispe against Dalmahoy, a member of the House, for a breach of privilege. The House of Lords decided the cause, notwithstanding this claim of

Shirley v.
Fagg, 27 Car.
2. 6 How.
St. Tr. 1121.

Crispe v.
Dalmahoy.
Vid. 6 How.
St. Tr. 1144.
Vid. also Hale
v. Slingsby, ib.
1130. 1187.

privilege. It may be said that there the question was decided only by the other House. But why then did they plead in this instance? For, by the course which they have adopted, they have brought the subject under the cognizance of the courts below before it came to you. When it was contended that the present claim of privilege was contrary to Magna Charta, which provides that no one shall be imprisoned, unless by the lawful judgment of his peers, or by the law of the land, it has been said that none but fanatics and drivellers in law could argue in this way, since the law of parliament was part of the law of the land. But that can hardly appear so wild and fanciful, when it is considered that your Lordships then, taking notice of the imprisonment of the counsellors at law, and the attempt of the Commons to controul your judgments, and obstruct the execution of them, represented this as “ a transcendent invasion on the right
 “ and liberty of the subject, and against Magna
 “ Charta, the Petition of Right, and many other
 “ laws which have provided that no freeman shall
 “ be imprisoned, or otherwise restrained of his li-
 “ berty, but by due process of law. This tends to
 “ the subversion of the government of this king-
 “ dom, and to the introducing of arbitrariness and
 “ disorder.”

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6 How. St.
Tr. 1153.

It appears then that this current of decisions has not been uniform, and that the claims of privilege have not been regularly admitted: that the claim for the servants of members has been abandoned; so that privilege may be stretched a little on one day, and reduced on another; that there are no

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prescriptive privileges ; that they may be lopped off, sometimes by the House itself, but more frequently by the courts to whose decisions the House of Commons has bowed. Other extravagant claims have been made. It was at one time claimed that the goods of members should not be taken in execution during the sitting of parliament. (Apsley's case, 17th Edw. 4.) That was abandoned. And, on the other hand, they have sometimes, doing what they would now consider as below their dignity, applied peaceably for a writ of privilege, which came from the Crown ; and thus they made application to the Crown to support their own privileges against it.

In Hall's case they fined, and the Ch. J. of the King's Bench seems to think that they may yet fine. But in Bur. 1336. there is a *dictum* by Lord Mansfield that they could not fine, and that seems now passed from. Then as to the act 1 Jac. 1. cap. 13. so little was it clear that a member, even when arrested in execution, might legally be set at liberty by privilege of parliament, that it was thought necessary by that act to give security to the Sheriff against any action for delivering out of execution any such privileged person.

There are other cases on which perhaps the House of Commons may rely : but the only one I shall in this place mention, is a recent one from the Journals of the Commons, which is a very great privilege curiosity. Admiral Griffith, a member, complained that certain persons had trespassed on his fishery. The House of Commons, having no doubt of its jurisdiction, proceeded to try the

Griffith's case,
1759.

cause like an action of trespass, though more clumsily than a court of law would have proceeded.

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The accused were found guilty, not of a trespass, but of a breach of privilege, and were ordered to stand committed; and afterwards, on their humble petition, after being reprimanded on their knees, they were discharged, paying their fees! So much for the *lex parliamenti, ab omnibus querenda, a multis ignorata, a paucis cognita*: of which law of parliament Ch. J. De Grey says, "I wish we had some code of the law of parliament; but till we have such a code, it is impossible we should be able to judge of it." And another Judge (Gould) says, "the *lex et consuetudo parliamenti* is known to parliament only." Thus then, from Admiral Griffith's case, it appears that so recently as the end of the last reign, the House of Commons carried notions of privilege so far as to hold plea of a trespass. I pass from these precedents to the decisions of the courts of law.

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Crosby's case,
1771. 3 Wils.
188. 2 Blac.
R. 734.

The Aylesbury case is one on which they particularly rely; which is well known to have been decided in favour of the House of Commons, against the opinion of Lord Holt, Ch. J. The question arose on a return to a *habeas corpus*, sued out by Paty and others, who had been committed by the House of Commons for a breach of privilege, by bringing actions against the constables of Aylesbury for refusing their votes at an election. Holt thought they should be discharged, observing "that this was not such an imprisonment as the freemen of England ought to be bound by; and that it did highly concern the people of England

Decisions.
Aylesbury
case. 2 Ld.
Raym. 1105.
1111.

14 How. St.
Tr. 857.

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Murray's case,
1 Wils. 299.

Hab. Corp.

Question of
privilege arising incidentally.

Bushell's case,
Vau. R. 135.
6 How. St.
Tr. 999. 1004.
Cases of Ast-
wich and Aps-
ley. *Ibid.*
14 East. 70.

"not to be bound by a declaration of the House of Commons in a matter that before was lawful." That is the case of the Aylesbury men. They also rely upon Murray's case, and that of *Rex v. Flower*, 8 T. R. 314. for the acknowledgment of [their] power by the courts of law. I have this observation to make on all of them; that they brought the question of privilege directly before the Court upon returns to writs of *hab. corp.* so that if the Court had liberated, there would have been a direct and immediate conflict of jurisdictions. We do not contend that there ought to be such a contest. One court committing, another cannot liberate. But where the question of privilege comes incidentally before a court of law, the Court may determine it, and no conflict takes place. When an action of trespass is brought in the proper court, it must not be stopped by an incidental question of privilege. The principal part of the present case is trespass, which the Court of King's Bench may try, and the House of Commons cannot; and, if an incidental claim of privilege is set up, the Court must deal with it as it would with an incidental question of prize or marriage, though properly determinable in the Admiralty or Ecclesiastical Courts; and that disposes of all the cases upon returns to writs of *hab. corp.* in which, if the Court had interfered, there would have been a direct conflict of jurisdictions. Vaughan, Ch. J. in his judgment in Bushell's case, cites two cases from Moor, 839. in the 9th of Eliz. and 13th of James I. in which the Court of King's Bench, upon returns to writs of *hab. corp.* stating contempt of the Court of

Chancery, liberated the prisoners. But we admit that now, if one court commits for a contempt, another will not liberate. But does it follow that if a person is wrongfully committed he can have no redress? We admit that this is the first instance of such an action, but a case may be put where the distinction would be taken and acted upon. The Crown has the authority over the army, and delegates that authority to an officer; the officer arrests a soldier illegally, *ex. gr.* for that he refused to obey an illegal order. The soldier sues out a writ of *hab. corp.* and the return is—imprisoned for disobedience of orders. The Court would refuse to liberate. But might not the soldier bring an action for the false imprisonment? It would be his duty to disobey; he would have been punishable if he had obeyed: and for that false imprisonment he might maintain his action, though the Court would not on such a return order his liberation. This doctrine is recognised by Lord Kenyon in *Rex v. Suddis*, 1 East. 306. Now the case is stronger for the Crown, because the interference between officer and soldier is a matter of peculiar delicacy. Though the courts, therefore, will not interfere where their interference would produce a conflict of jurisdictions; why should not the wrong doer answer in damages? Let there be in this instance the same remedy as for the soldier. One might figure such an absurdity that it would be impossible to refuse redress. Suppose those men who were imprisoned in Admiral Griffith's case had brought an action against him for breaking and entering their close, and he pleaded the decision of the House of Com-

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* Bayley, J.
Vid. 14. East.
129. 160.

mons. To be sure the House might imprison them for bringing the action, but how could the Court allow that sentence to be conclusive as to the right of property? It was said by one of the Judges * below, that if privilege of parliament were examinable in the Court of King's Bench in such a manner as that it ought to have been averred as a traversable fact, that the party had been guilty of the contempt or breach of privilege; the fact would be examinable, not merely in the King's Bench, but in every inferior court in which trespass could be brought, even in the County Court. That, however, is only *idem per idem*; for from the course actually adopted by the Commons, the inferior courts might have the cognizance of their privileges, and the County Court might have had to try this great cause.

Record.

14 East. 159.

Oates's case,
10 How. St.
Tr. 1163—4.

This brings me to the argument founded upon the circumstance that the House of Commons is a court of record. I abandon the argument that the House cannot commit for contempt, as not being a court of record, or at least I do not push it so far as it has been carried. But the circumstance of its being a court of record has been relied on below, and I submit it is no court of record. It has no regular form of proceeding; and if its law is known to few, as Lord Coke said, its practice is known to none. In Oates's case the Court of King's Bench would not admit the House of Commons to be a court of record, and refused evidence which would have been admitted if that House had been a court of record. The entry in the journals of the House of Lords of the reversal of a judgment, is evidence of that reversal (*Jones v. Randall*, Cowp, 17); that

being its record, as a court of judicature. But the House of Commons is no court of record: no writ of error can be brought in that House; and neither its journals nor those of the House of Lords are records (*Rex v. Arundel*, Hob. 110); for though, as Lord Holt says, the House of Lords be a supreme court of record, yet every vote there passed is not an act of judicature, unless the proceedings in order to it had been judicial (*Rex v. Knollys*). It is true Coke says in 4th Inst. 23. that in his opinion the parliamentary journals were entitled to the authority of records, and he refers to 6 Hen. 8. cap. 16. But that proves no such thing. It prohibits the absence of any of the members without licence entered of record in the clerk's book; but that is merely a loose way of stating what stands to the House of Commons in place of a record. In the case of *Rex v. Creevey* it appeared that Mr. Creevey had published a correct account of a speech of his in the House of Commons for his constituents. An action was brought for a libel, and a verdict given against him. A motion was made for a new trial, on the ground that the House of Commons was a Court of Judicature, and that the publication of its proceedings was allowable, on the same principle as the publication of the proceedings of other courts of justice; and the case of *Curry v. Walter*, 1 B. P. 525. was cited. But a new trial was refused.

But, supposing the House of Commons to have this power, the Plaintiff's privilege of parliament ought to exempt him. I refer to the cases of *Walker v. Grosvenor* (Earl of), 7 T. R. 171. and that of

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Rex v.
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12 How. St.
Tr. 1195.
1 *Ld. Raym.*
10. *Skin*, 336.
&c. &c.

Rex v.
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Vid. Wilkes's
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Jay v. Top-
ham, 12 How.
St. Tr. 881.

Breaking open
the door.

Semayne's or
Seyman's case,
5 Rep. 91.
Cro. El. 908.
Moor, 668.
Yelv. 28.

Catmur v. Knatchbull (Sir E.), 7 T. R. 448. The case of *Brearton*, 1 Hats. 131. is also in point; and one still more in point occurs in the same vol. After this it will be hard for the Commons to contend that their own members have not the privilege of exemption from commitment for contempt.

Now I come to the question of excess. It is clearly laid down by Sir F. Pemberton in the proceedings relative to the case of *Jay v. Topham*, that the Court would inquire whether there was excess or impropriety in the execution of the order of the House. Two things are here complained of as excessive or improper in the manner of executing the order of the House:—1st, the breaking open the outer door; and, 2dly, the using a military force. As to the breaking open the outer door, the authority of *Semayne's* case falls from under their feet, though the Judges below relied on it. The reliance is on the words in the report in *Cro. El.*; “that *Williams* agreed with the opinion of *Yelverton* and *Fenner in omnibus*, that the Sheriff might “not break any man’s house to take execution, “unless in the Queen’s case, *or for a contempt.*” The House of Commons was well advised to resort to the report in *Cro. El.* for Coke says nothing about the contempt; and as to the opinion of *Yelverton*, he himself must have best known what he said, and hear what he says, “unless it be on a “*capias utlagatum*, which is the Queen’s suit for “the contempt of the party, it is not lawful for “the Sheriff to enter the house unless it be open, “&c.” This then is no authority for them. Then
Military force. with respect to the employment of a military force,

that is open to us on the pleadings, and we say it was illegal. It has been said that the soldiers were bound to assist in executing the warrant as well as other citizens. But the record alleges that it was a military force of our Lord the King. And in Horne's case it was said by De Grey, Ch. J. "the King's troops may, like other men, act as *individuals*, but they can be employed as *troops* by the act of the government only," (Cowp. 682). That is the objection in my argument. The allegation is, that they were soldiers of our Lord the King, and therefore they were employed as the King's troops, and not as citizens in red coats. Now why do I contend that the warrant could not legally be executed by soldiers?—1st, the law does not recognize soldiers as such, and so it was argued in the defence of Lord Russel's innocency; by Sir R. Atkins, who says, "to seize and destroy the king's guards. The guards! What guards? What or whom does the law understand or allow to be the King's guards for the preservation of his person? Whom shall the Court that tried this noble Lord, whom shall the Judges of the law that were then present upon their oaths, whom shall they judge or legally understand by these guards? They never read of them in all their law books. There is not any statute law that makes the least mention of any guards. The law of England takes no notice of any such guards, &c." King Henry VII. was the first who set up a band of gentlemen pensioners as a guard about his person; and the laws and constitution of these kingdoms, as Blackstone observes, know no such state as a perpetual

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Horne's case,
Cowp. 682.

9 How. St.
Tr. 730—1.

1 Blac. Com.
408.

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13 Car. 2 cap.
6.

North's Ex-
amen, 560.

standing soldier, bred up to no other profession than that of war. It is well known that the army exists only by suffrance from year to year ; and so jealous is the law of the interference of the military, that the troops are removed from assize towns when the Judges arrive there. And so it is when elections take place ; so little does the House of Commons like soldiers, except on particular occasions. The King's troops, therefore, existing by suffrance only from year to year, cannot be proper instruments for executing the orders of the House of Commons. The command of the militia, as well as that of the regular army, is by law in the Crown ; and how is the House of Commons to proceed when they employ soldiers ? They cannot command the assistance of the troops by their own authority. They must apply to the Crown, and then what becomes of their privileges ? They have only their mace and Serjeant at Arms. " They keep a kawk," (the Serjeant) as *Roger North* says in his *Examen*, " and must every day provide flesh for their hawk ;" and he holds his place by patent from the Crown. When a body claiming a power has not means to exercise that power, it is a strong argument to show that it has not the power ; as, if a court could not enforce a *venire*, it would be a strong argument to show that it could not try by jury. And so, here, as the House of Commons has not the means of enforcing the service of the King's troops by its own authority, it is a strong argument against their right to execute their orders by the assistance of soldiers. They claim their privileges as a protection against the crown, and yet they say they will enforce their

orders by means of the King's troops. The execution of their orders by the aid of a military force is therefore inconsistent with their own argument, and this is one more of the difficulties in which the case has been involved.

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Mr. Courtney. The points to be considered in this case, as it appears to me, are these :—1st, Whether the House of Commons has the power of committing for contempt, as a breach of privilege. 2dly, Whether the warrant is a good ground of commitment. 3dly, Whether it has been executed in a proper manner.

1st, Whether the House of Commons has the power of committing for contempt as a breach of privilege. It can only have it by immemorial usage, by statute, or statutory recognition, or from necessity, as being inherent in its existence. I am not driven to show that *parliament* had not that power from time immemorial. It is enough for me to show that the House of Commons had it not. But the House of Commons had itself no existence till after the time of legal memory, till the reign of Hen. III. as was stated below. They attempted to meet this argument in this way : they said that the House of Commons, though it had no separate existence till after the time of legal memory, sat as a collective body with the King and Lords. But there is no evidence of that, so that this argument as to their having the power from time immemorial falls to the ground. And how do the facts agree with the assumption? They cannot go back further than the reign of Elizabeth as to the exercise of the power. If that were not a sufficient answer, it

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might be said that if they had the power when they sat with the Lords and King, it does not follow that they have it when separate. Each member may not have the powers which belonged to the whole body, and the House of Commons certainly has not a separate legislative power. 2dly, They have no such power by statute. They have indeed relied on two acts of parliament; but when these are examined, the argument founded upon them falls to the ground. The act, 4 Hen. 8. cap. 8. was passed upon the occasion of the imprisonment of Strode for something which he had done in parliament, and the extent of it is no more than to give personal immunity to the members for things done in discharge of their duty. The other act, 1 Jac. 1. cap. 13. which they say is a statutory recognition of this privilege, after enacting that, when a member of parliament, arrested in execution, should be set at liberty by privilege of parliament, the party might again take him in execution after the privilege of that session of parliament should have ceased, contains this proviso; "Provided always that this act, or any thing therein contained, shall not extend to the diminishing of any punishment, to be hereafter, by censure in parliament, inflicted upon any person which shall hereafter make, or procure to be made, any such arrest as aforesaid." Now, giving this its most extended meaning, it only applies to punishment, to be inflicted for arresting members during the sitting of parliament; and the House of Commons must have that power to preserve its existence. The third ground is that of necessity, and that appears to me

to be the formidable ground : for it is impossible to deny that a body, such as the House of Commons, must have immunities and privileges, and complete self-protection; which implies all the power that is necessary to make it effectual. But it has been justly and wittily said, that power is a sword, privilege a shield : and, as to the assumption of power, there is hardly any thing that may not be construed into a breach of privilege, or any power that may not on that ground be assumed. I refer to what Lord Clarendon says, “ After the act for the continuance of the parliament, the House of Commons took much more upon them, in point of their privileges, than they had done, and more undervalued the concurrence of the Peers : though that act neither added any thing to, nor extended their jurisdiction, &c. &c. But now that they could not be dissolved without their own consent, &c. they called any power they pleased to assume to themselves a branch of their privileges, and any opposing or questioning that power a breach of their privileges, which all men were bound to defend by their late protestation, and they were the only proper judges of their own privileges. Hereupon, they called whom they pleased delinquents, received complaints of all kinds, and committed to prison whom they pleased, which had never been done or attempted before this parliament, except in some apparent breach, as the arresting a privileged person, or the like.”

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Hist. Rebel,
vol. i. p. 212.

I would also admit the power of the House of Commons to commit for contempt, that is, for con-

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tempt properly so called, distinguishing the legal from the popular sense of the word. The legal meaning is an actual or constructive obstruction of process. In common language it means contumely. Where there is a legal contempt, or an actual or constructive obstruction to their proceedings, the House of Commons has the power, not vindictively to punish the offence *qua* offence, but to abate the nuisance. But there the power ends where the necessity ends. We do not contend that immunity ought to be given to libels, but that the House of Commons ought not to be judges in their own cause. The House of Commons has no criminal jurisdiction, or, if it has the power to punish an offence as such, it is an anomaly in the history of our courts that such a power should belong to a body which cannot apportion the punishment to the offence. Take the present offence for instance. A libel may be the most atrocious, or it may be the most trifling of personal affronts. And yet see the situation of the House of Commons; if the most atrocious libel against it should be published on the last day or the last hour of its sitting, it can imprison the libeller only for that day or hour. But there is no such anomaly if the power exists merely for the purpose of removing obstruction.

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good ground
of commit-
ment.

2dly, Whether the warrant is a good ground of commitment. Besides other objections, it does not pretend to commit for a contempt, but for a breach of privilege; and that was a libel, and a libel on a past proceeding of the House, as appears by the record, and could not therefore have been an obstruction of a present proceeding. The mere naked

fact here is the admission that a paper called a libel was printed by the Plaintiff's authority; and, I submit, the libel should have been set out on grounds of justice; for if it appears that it is no libel, you will not lend your judgment and authorities to the injustice. The House of Commons should, therefore, have shown the grounds of their proceeding. But the warrant does not even state that the Plaintiff is guilty; it only states that the Plaintiff, *having admitted* that the paper which the House of Commons resolved to be a libel was printed by his authority, was *thereby* guilty of a breach of privilege. How could the admission make him guilty of a breach of privilege? Then there is no allegation in the warrant of the publication of the libel; and the libel cannot therefore be a breach of privilege, for it might have been all along in his table drawer for any thing that appears on this warrant. It has been argued that no other court will relieve, because the Plaintiff was committed for a contempt. I have already said that it is not a commitment for contempt; but suppose it were, there are in Moore's Reports, 839. 840. a number of cases (Apsley's and others), which show that the rule contended for is laid down too broadly, and that other courts will sometimes interfere in such cases. Ch. J. Vaughan says, in *Bushell's case*, "that the cause of the imprisonment ought, by the return (to a *hab. corp.*) to appear as specifically and certainly to the Judges of the return, as it appeared to the Court, or person authorised to commit, else the return is insufficient." But it could not so appear by a return founded on this warrant. It may be,

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Van. Rep.
135. 6 How.
St. Tr. 999.

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9 Com. Jour.
8 How. St.
Tr. 223.

and has been argued, that your Lordships cannot take cognizance of the question, whether it is or is not libel, breach of privilege, or contempt, in the particular instance, that being settled by the resolution of the House of Commons. But in Fitzharris's case your Lordships refused to receive an impeachment against him. The House of Commons said this was illegal, and resolved that the proceeding in any inferior court would be a breach of privilege. But Fitzharris was tried by the Court of King's Bench, convicted, and executed. This shows that your Lordships may investigate whether there is a breach of privilege or not, notwithstanding their resolution.

Fitzherbert's
case, D'Ewes
Jour. 482.

In Fitzherbert's case, 35 Eliz. there being then a doubt how a member, who had been arrested, should be relieved, Coke, who was then Speaker, said, "First, this writ of privilege must go from the body of this House made by me, and I to send it into the Chancery, and the Lord Keeper to direct it. Now before we make such a writ, let us know whether by law we may make it, or whether it will be good for the cause or no. For my own part, my hand shall not sign it, unless my heart assent to it. And though we make such a writ, if it be not warrantable by law, and the proceeding of this House, the Lord Keeper will and must refuse it." This was an acknowledgment that the Lord Keeper had authority to inquire into the matter, whether a breach of privilege or not. And so it appears also from the case of Richard Coke, 1 Hats. 96. upon whom a subpoena out of Chancery had been served; and the Commons

R. Coke's
case, 1584.

being of opinion that their privileges were concerned, sent a deputation of some of their members to the Lord Chancellor, who answered, "that he thought the House had no such privilege against subpœnas as they contended for, and that he would not allow any precedent in the House of Commons to that effect, unless they could show that they had been allowed and ratified by the precedents in Chancery." Another authority is that of Lord Holt in the case of *Rex et Reg. v. Knollys*, who said that their resolution would not make that a breach of privilege which was not so before. Your Lordships ought, therefore, to be put in a situation to consider whether this is a breach of privilege. Then there are these critical objections to the warrant:—1. That it does not allege that the libel was printed by the authority of the Plaintiff; but only that he, having *admitted* the fact, was *thereby* guilty of a breach of privilege. How the admission can be tortured into a breach of privilege I cannot understand:—2. That it does not allege that the libel was *published* by the Plaintiff:—3. That the word "*reflecting*, on the just rights," &c. was equivocal, for he might have reflected upon them favourably. In an indictment for obtaining money on false pretences, if it is alleged that the Defendant unlawfully, knowingly, and designedly, *pretended* so and so, by means of which pretences he obtained the money; what doubt could there be that this was a charge that the pretences were false; yet they say that it is not sufficient, but you must proceed to negative the pretences to be true. I might ask whether, if this nicety is required in

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Rex v. Airey.
2 E. R. 30.

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indictments, it ought not *a fortiori* to be required in such a penal execution as this.

3dly. Whether the warrant was properly executed. And, first, with respect to the breaking open the outer door, Semayne's case, for the reasons already stated, is no authority whatever for it. It is only where the King has an interest that the outer door can be lawfully broken open; and Treby, Ch. J. in a note to Dyer, says, "By the common law no house may be broke open by the officer of the King, at the suit of a common person, otherwise at the suit of the King. But now by 21 Jac. 1. cap. 19. §. 8. concerning bankrupts, the commissioners may break open the house of another for the debt of the debtor: and if bankrupts convey their goods to their neighbour's house, the commissioners cannot, but the Sheriff may, break open the house, because he is the sworn officer of the King. The commissioners may break open the booth or shop of another to get at the bankrupt's goods." The act gives the commissioners power to break open, not only shops and warehouses, but also houses and chambers; and yet, though the power is so distinctly given, the house can be broken open only by the King's officer. The only ground on which this is justified, is, that the public is a party, and that it is for the benefit of the commonwealth; but these words, in order to have such an effect, must be held to imply something beyond an ordinary expediency—something of a moral necessity. But as long as the Plaintiff confined himself to his house, he could not obstruct the proceedings of the House of Commons: if he came out, the

warrant might be executed; so that there was no necessity in this instance for breaking open the door. Secondly, with respect to the employing a military force, I need not add any thing to what has been said already. The jealousy of the constitution is very strong as to the interference of soldiers in the execution of process, and pervades the whole frame of our municipal law. The Sheriff, or the officers of the Houses of Lords or Commons, have a right to the services of individuals, whatever be the colour of their coats. That is clear. But the House of Commons has no power to call on soldiers as a body under their officers, and acting as the servants of the Crown.

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Lord Eldon (C.) The Counsel for the Plaintiff having been now heard, I propose to your Lordships that the Counsel for the Defendants should not be heard, until we shall have received the advice of the Judges on the following question, viz. “Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally without the particular circumstances, and the matter were brought before the Court of King’s Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King’s Bench would discharge the prisoner, because the particular facts and circumstances, out of which the contempt arose, were not set forth in the warrant.”

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the Judges.

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Answer.

Judgment.

The question being handed to the Judges, and they having consulted among themselves for a few minutes, Lord Ch. Baron Richards delivered their unanimous opinion that in such a case the Court of King's Bench would not liberate.

Lord Eldon (C.) That this is a case of very great importance none will dispute: but at the same time I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the Defendants before proceeding to judgment. But in my view of the case, considering it as clear in law that the House of Commons have the power of committing for contempt; that this was a commitment for contempt; that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant; and being of opinion that the objections in point of form have not been sustained, unless any other Noble Lord should express a wish to hear the Counsel for the Defendants, I shall now move that the judgment of the Court below be affirmed.

Lord Erskine. When this matter was first agitated, I understood that the House of Commons intended to pursue a very different course. I was therefore alarmed. I expressed myself, because I felt, with warmth. I have changed none of the opinions which I then entertained; I then said that the House of Commons ought to be jealous of such privileges as were necessary for its protection. My opinion is that these privileges are part of the law of the land, and upon this record there is nothing

more than the ordinary proceeding; the Speaker of the House of Commons, like any other subject, putting himself on the country as to the fact, and pleading a justification in law; for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeding gave me the most heart-felt satisfaction; for if the judgment had been adverse to the Defendants, the House would no doubt have submitted. It would be a libel on the House of Commons to suppose that it would not. Therefore, by this judgment, it appears that it is the law which protects the just privileges of the House of Commons, as well as the rights of the subject.

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The case has been argued with great propriety; but it was contended that it was not alleged in the warrant that the libel was *published* by the Plaintiff. But it is alleged that the paper was printed by his authority. And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word *reflecting*, standing separately, would not be sufficiently distinct. But the warrant recites that the letter had been adjudged to be a libellous and scandalous paper, reflecting on the just rights and privileges of the House of Commons; and the meaning there must be, arraigning the just rights and privileges of the House.

I myself, while I presided in the Court of Chancery, committed for contempt, in a case in which a pamphlet was sent to me, the object of which was, by partial representation, and by flattering the

*Vid. ex parte
Jones. 12 Ves.
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Judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and, have only to add, that I fully concur in the opinion delivered by the judges.

The Counsel were called in, and informed that the House did not think it necessary to hear Counsel for the Defendants. And then, without further proceeding, the judgments of the Court below were AFFIRMED.

ENGLAND.

IN ERROR FROM KING'S BENCH.

RANDOLL and others—*Plaintiffs in error.*

DOE, on the several demises, and on the joint demise, of Roake and others. } *Defendant in error.*

May 2, 7, 16, 1817. Devise of freehold estates to J. R. nephew and heir at law of testatrix for life; and on his decease "to and amongst his children lawfully begotten, equally at the age of

"twenty-one, and their heirs as tenants in common: but if
"only one child shall live to attain such age, to him or her,
"and his or her heirs, at his or her age of twenty-one years:
"and in case my said nephew shall die without lawful issue,
"or such lawful issue shall die before twenty-one," then
 over. Held by the Court of King's Bench, and judgment affirmed in Dom. Proc. that the children of J. R. took a vested remainder.

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IN the month of June, 1811, the Defendants in error brought an ejectment in his Majesty's Court of King's Bench, for the recovery of certain dwelling-houses, with the appurtenances, in the parish of Christ Church, in the City of London, which, under the will of their great Aunt Sarah Trymmer they became entitled to on the decease of their late father John Roake. The demises in the ejectment are laid on 1st June, 1811; the Plaintiffs in error entered into the common rules on defending as landlords, and pleaded the general issue. The trial of this cause was suspended for some time, during the pendency of another ejectment upon the same title, for premises in the county of Surry, in which a special case had been made at the summer assizes, 1811, but was not argued till May, 1813, when judgment was given therein for the now Defendants in error. Shortly after the above-mentioned determination, the proceedings in this ejectment were renewed, and the issue therein, coming on to be tried at the adjourned sittings after Easter Term, 1813, a special verdict was found, with the usual formalities; and as no point of form occurred, the following abstract of the verdict will suffice.

Doe v. Now-
ell, 1 Maul.
Sel. 327.

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Special ver-
dict.

Sarah Trymmer, widow, being seized in fee of the premises in question, duly made and published her last will in writing, dated 6th June, 1783, executed and attested as the law requires for passing real estates; and thereby, after (amongst other things) giving a certain specific bequest to John Roake, her nephew, she gave and devised the tenements and hereditaments therein mentioned (whereof the premises in question are parcel) in the following words:

Devise.

“ I give and devise all my freehold estates in the
“ City of London and County of Surry, or else-
“ where, to my said nephew, John Roake, for his
“ life, on condition, that, out of the rents thereof,
“ he do, from time to time, keep such estates in
“ proper and tenantable repair. And on the decease
“ of my said nephew John Roake, I devise all my
“ said estates (subject to and chargeable with the
“ payment of 30*l.* a-year to Ann, the wife of the
“ said John Roake, for her life, by even quarterly
“ payments) to and among his children lawfully
“ begotten, equally, at the age of twenty-one, and
“ their heirs as tenants in common; but if only one
“ child shall live to attain such age, to him or her,
“ and his or her heirs, at his or her age of twenty-
“ one. And in case my said nephew John Roake
“ shall die without lawful issue, or such lawful issue
“ shall die before twenty-one, then I devise all the
“ said estates (chargeable with such annuity of 30*l.*
“ a year to the said Ann Roake for her life, in
“ manner aforesaid) to and among my said nephews
“ and nieces, Miles, Thomas, John, James, and
“ Sarah Finfold, and Susannah Longman, or such

“ of them as shall be then living, and their heirs
 “ and assigns for ever.”

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The special verdict then finds, that Mrs. Trymmer died, seized on 4th December, 1786, without having revoked or altered her will, leaving the said John Roake, the first devisee, her heir at law ; who at the time of Mrs. Trymmer's decease was a widower without issue, and who upon such decease, entered and became seized as the law requires by virtue of the devise. That on 10th May, 1787, the said John Roake being so seized, married Elizabeth Rippen, and the four lessors of the Plaintiff (two of whom were born before, and the other two subsequently to the execution of the deed or levying of the fine hereinafter stated) are the lawful issue of such marriage, and the only children of the said John Roake. It is then found, that on the 5th November, 1789, an indenture of that date was duly executed, purporting to be made between the said John Roake (whose wife was also a party to the release) of the one part, and one Richard Nowell of the other part, being a deed for leading the uses, of a *fine sur conuzance de droit*, of the premises in question ; with a declaration, that such fine, when levied, should enure to the use of the said John Roake, his heirs, and assigns. That a fine was levied thereof accordingly, as of Michaelmas Term in the same year, in his Majesty's Court of Common Pleas at Westminster ; and proclamations were had and made thereon in due form of law. The special verdict goes on to state indentures of lease and release, dated 22d and 23rd June, 1790, from the said John Roake and his wife to

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Death of Tea-
 tatrix. J. R.
 becomes
 seized,

and levies a
 fine,

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and conveys
the lands to
J. B. who
devises to
Plaintiffs.

Ejectment by
Defendants,
who recover.

Error in Dom.
Proc.

one John Bell, conveying the premises in question, as far as they lawfully could or might, for a valuable consideration in money, unto the said John Bell ; who entered, and afterwards made his will, executed and attested as the law requires for the passing of real estates ; and having thereby given and devised the same premises to the now Plaintiffs in fee-simple, departed this life without revoking or altering such will ; whereupon the now Plaintiffs entered as his devisees. That the said John Roake, the first devisee in the said Sarah Trymmer's will, died on the 18th February, 1803, leaving the several lessors of the now Defendant surviving him ; of whom the two first named lessors attained the age of twenty-one years, before or upon 25th August, 1810, the two others being still under age, and that after an actual entry by the now Defendants' lessors on 1st June, 1811, the present ejectment was brought on 8th June in that year. Upon this special verdict, judgment was given (without argument) in the Court of King's Bench in favour of the now Defendants' lessors. A Writ of Error having been brought in the House of Lords, the Plaintiffs assigned general errors, and the Defendants pleaded *in nullo est erratum*.

Mr. Leach (for Plaintiffs in error). The whole question turns upon this, whether the testator meant to give any thing to any one till he or she attained the age of twenty-one. If the will had stopped with the words " to and amongst his children lawfully begotten, equally at the age of twenty-one, and their heirs, as tenants in common," I pre-

sume no lawyer would question that this would have been a devise to a person or persons at twenty-one, and that no estate vested till twenty-one. This case has been considered as coming within the principle of *Boraston's* case in Coke, and of *Bromfield v. Crowder*, 1 B. P., N. R. 313., decided below in 1814, and affirmed in this House in 1815. But in considering the expressions of the will, your Lordships have to determine on the whole, whether this was intended as a condition, precedent, or subsequent. The universal rule of construction with respect to wills is, that the intent is to be collected, not from particular expressions, but from the whole of the will taken together; so that it is unnecessary to refer to any particular class of cases, as that is the universal rule. Then the testatrix having in this case given an estate at twenty-one, and not till twenty-one, we have to consider whether from the whole of the will any intent can be discovered contrary to the import of that expression. The will proceeds thus: "but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one years;" that is, if more than one, they shall take equally at twenty-one; if only one, then that one shall take the whole at twenty-one. Is not this then a still stronger expression of contingency? The second clause not controlling the first, but expressing with more precision the intent before indicated. Then follows "and in case my said nephew shall die without *lawful issue*," then over. Is there any thing in the terms of this devise over to show an intent that any of the children should take before

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Boraston's
case, 3 Rep.
19. 1 P. W.
170.

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TION SUBSE-
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*Vid. Fawlk-
ener v. Fawlk-
ener, 1 Vern.
22.*

twenty-one? Lawful issue may be considered as meaning children. It would be useful to the Plaintiff in error if the words could be taken in a general sense, as the father then would have taken an estate tail. But I cannot contend for that meaning, as the subsequent expression shows that the testatrix by the word *issue* here meant children. Then read it, "in case my said nephew shall die without children," I give it over; and then follow the words on which the question turns, for unless the subsequent expression controls the previous words, the first expression prevails, "or such lawful issue (children) shall die before twenty-one," then over. They say that the words "or such lawful issue" should die before twenty-one," control the meaning of the previous part of the will, and that the testatrix must, by necessary implication, be presumed to mean that the children should take before twenty-one, and upon that depends the case of the Defendants in error. But if there is any principle more settled than another in the construction of wills, it is this, that no implication arises in favour of any one merely from an estate limited over to another on his death, unless it is given over on his death to the heir at law. If an estate is given over to the heir at law on the death of A. B. there is a clear intent that the heir shall not take till the death. And where is it to go in the mean time? An implication arises that A. B. shall in the mean time enjoy the estate. But if it is limited over on the death of A. B. not to the heir at law, but to a stranger C. D. the estate until the death of A. B. goes not to A. B. but to the heir at law, who takes all that is undis-

posed of. It may be conjectured that the testator did not intend that the heir at law should take, but the heir takes by the rules of construction. In the case* on the authority of which this was decided, it is reasoned thus: if the construction contended for by the Plaintiff in error leads to absurd consequences, it will follow that such a construction could not be according to the intent of the testator. But the answer is, that this objection applies to nine wills out of ten. An ingenious lawyer may draw absurd conclusions out of the expressions of almost all wills. But that arises from the testator's having taken only a limited view of the subject; and the rule is to go by the expressed intention. I admit that such objections may be raised here; but the answer is, that the testatrix did not look to all the circumstances and consequences either in fact or in law. Her purpose, however, was that none of the children should take till twenty-one. So that the Court below decided on conjecture in that other cause,† and made a wiser will; but Courts of Justice cannot properly make wills for the parties.

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* *Qy. Doe v. Nowell*, 1 Maul. Sel. 327.

† *Qy. Doe v. Nowell*, 1 Maul. Sel. 327.

Mr. Richardson (for Plaintiffs in error). One would think that when an estate is given at a certain age or time, the donor intended that nothing should be given unless at that age or time. That seems to have been the old law (10 Coke, Rep. p. 50.), and Grant's case is there cited. (*Lord Eldon*, C. That was a devise to one person; but what estate in the present case would the first child take at twenty-one? Was he to wait till the others attained twenty-one, or to take the whole, and then divest as the

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Grant's case,
vid. 2 Leon.
36. Cro. El.
122.

others came of age?) He would take and divest ; I mean to argue it in that way. Grant's case was that of a devise of land to John Grant when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. Grant levied a fine at his age of twenty-one, and afterwards attained the age of twenty-five. The question was, whether the issue were barred, and the Judges were of opinion that they were ; but they considered the estate tail as *in futuro* and contingency at the time the fine was levied. I am aware that the decision there would have been the same whether the interest was vested or not ; but the Judges proceeded on the supposition that it was contingent. These words then " to and amongst his children at " the age of twenty-one," would give a contingent remainder, and the words " but if only one child " shall live to attain such age, to him or her, and " at his or her age of twenty-one," are still stronger as words of contingency. It was supposed elsewhere that it was necessary to give a vested interest to the children of Roake to prevent the estate's going over, as it otherwise might, though there were descendants of Roake ; as suppose they all died under twenty-one, leaving twenty children, it was said to be against the intent that the estate should in that case go over, and therefore to effectuate the intent the remainder must be vested. In answer to that, I say that the remedy does not cure the defect, for if no child attained twenty-one it must go over, or if not, it must be by force of the words " in case " my said nephew shall die without issue," and that will not do unless it should be held to mean an in-

definite failure of issue, and in that case Roake had an estate tail.

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They say that the children, as they came in *esse*, took estates defeasible on their not attaining the age of twenty-one. Now the testatrix provided for one event, that if only one child should attain twenty-one, then to that one, and if all died but one before twenty-one, that one would take the whole. Then suppose there are four children, and one dies before twenty-one, leaving children, if this was a vested interest in him before his death, his interest in the quarter of the estate would descend to his children; and so if a second and a third should die before twenty-one, leaving children, their shares would descend. Then the fourth attains twenty-one, and he then takes out of the children the whole interest so vested in them. But suppose two die, leaving children, and two attain the age of twenty-one, the two take only the half, and the other half goes to the children, as the estate is not divested except the children of Roake should be reduced to one attaining the age of twenty-one. Such a construction is clearly contrary to the intent of the testatrix, as it is clear that she meant that those only should take who attained twenty-one, and that if only one attained that age, then he should take the whole. They say it is necessary it should vest in the children before twenty-one, to prevent its going to the Pinfolds. But it will not prevent it, for if none were to attain twenty-one, it must go over if not prevented by the word "in case my said nephew shall die *without lawful issue*." When the latter clause comes to be considered, it is difficult to con-

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tend that the word *issue* can be understood as meaning any thing more than immediate children ; and if it designates immediate children, then the estate may go over so as to defeat the subsequent issue of Roake ; and if that is not the intent of the testatrix, then the words *without lawful issue* must be understood to mean a general failure of issue, and Roake takes an estate tail. By giving him an estate tail, the consequences will be to prevent the estate from going over to the less favoured branches, and that is the only way in which it can be prevented, and there the issue is barred by the fine.

Boraston's
case, 3 Rep.
—Goodtitle d.
Hayward v.
Whitby, 1 Bur.
228.

In that class of cases commencing with Boraston's case and ending with *Goodtitle, d. Hayward v. Whitby*, something was done with the estate in the mean time for the benefit of the devisee or some other person, and the decision turned on that distinction. In another small class of cases commencing with that of *Edwards v. Hammond*, in Levinz and Shower, which was the authority on which the case of *Bromfield v. Crowder* was decided, the decision did not turn on that distinction. If the report of the case of *Edwards v. Hammond* were correct as it is given in Shower, it would be distinguishable on the ground of the intent to protect the estate of the issue male. But the inspection of the roll seems to exclude that interpretation, and the report must be taken as in Levinz. According to that report it was a special verdict in ejectment, and it was stated to be a surrender by a copyholder of Borough English, to the use of himself for life, and after, to the use of his eldest son if he should attain twenty-one, *provided and upon condition that*

Edwards v.
Hammond, 3
Lev. 132. Et in
2 Show. 398.
nom. Stocker
v. Edwards.
Bromfield v.
Crowder, *vid.*
Fear. Con.
Rem. 6 ed.
245, 7. n.

if he died before twenty-one it should remain to the surrenderer and his heirs, and the question was whether his attaining twenty-one was a condition precedent or subsequent. It was argued on the one side that it was a condition precedent, and that the estate was in abeyance till he attained twenty-one, and it was argued on the other side, and so held, that though by the prior words "to the use of his eldest son *if he should attain twenty-one,*" imported a condition precedent (from which it appears that it would have been held a condition precedent if it had stood on the prior words), yet on all the words taken together it was a condition subsequent. That was inferred from the devise over "provided and on condition that if he died before "twenty-one, &c." as if the testator meant to undo what he supposed he had before done; and the case was decided on the analogy of the case of *Spring v. Caesar*, in 1 Roll. Abr. 415. pl. 12. and in Jones, 389. If these authorities depend upon any principle, it is this, that the Court collecting the intent from all that appears within the four corners of the will may upon the ground of the intent disregard the word *if*, or any other word importing contingency, and in another case *Doe, d. Hunt, v. Moore*, 14 East. 601. the Court, not carrying the principle further, disregarded the word *when*. But it is admitted that the word *if* or equivalent words, do import a contingency. And why disregard the words of contingency here? Contingent estates depend on certain accidents, such as that the life or particular estate being gone before its natural expiration, the contingent remainder cannot vest at

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May 2, 7, 16, 1817. all. But the testatrix knew nothing of that, and uses the words of contingency in their ordinary sense; and why disregard these words on the ground of an intention to use them in a sense which she never dreamed of?

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There are circumstances in the present case which distinguish it from those on which they rely for the Defendant in error, as so much depended there on the particular words; and your Lordships will probably not be disposed to carry the principle farther than the words in these cases will bear. The contingency here rests not merely on *at* in the first clause, but also on *if* in the second, and the remainders are therefore contingent, or Roake took an estate tail; and whichever of these is the true construction, the purchase under the fine is good. This would otherwise be a very hard case for the Plaintiff in error, &c.

Sir S. Romilly (for the Defendants in error). The question depends entirely on the technical effect of the words in the will. They speak of the hardship of their situation, but our hardship is the greater. Your Lordships, however, cannot consider the situations of the parties, your business being merely to lay down the law and to fix it, as if it were fixed by the legislature.

The question lies in a very narrow compass, and depends on a point of which the testatrix knew nothing, whether a remainder is contingent or vested. That again depends on decided cases, and the point has been settled by the highest authority in this country, and it is not competent to this

House, I speak with deference, to reverse its own decision. The point was also decided in another case depending on this will, *Doe, d. Roake, v. Nowell*, 1 Maule. Sel. 327. in K. B. on the authority of *Bromfield v. Crowder*, and though Mr. Preston with much ingenuity endeavoured to distinguish them, the Court found no substantial distinction, and Lord Ellenborough says, "I think, "this case concluded by *Bromfield v. Crowder*, "which was very fully considered, &c." That case of *Bromfield v. Crowder* underwent great consideration. It was sent from the Rolls to the Court of Common Pleas, where it was argued twice by Serjeants Williams, Lens, Bayley, and Shepherd; and after as great consideration as any case ever underwent, and after the record had been consulted for the particulars of the case of *Edwards v. Hammond*, the Court was of opinion that the remainder was vested, though that case was stronger for the contingency than the present case, for it was "if the "said John D. Bromfield shall live to attain the age "of twenty-one years," and not as in the present case "to and amongst his children, &c. at the age "of twenty-one." The M. of the Rolls decreed according to that opinion, and the decree was on appeal affirmed by the Lord Chancellor, and then the case being appealed to this House your Lordships were of opinion that it was rightly decided. In that case the testator John Davenport, after charging his real and personal estates with payment of his debts, legacies, &c., gave an annuity of 50*l.* to his nephew and heir at law Samuel Crowder, and a legacy of 100*l.* to his godson John Davenport.

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Bromfield v.
Crowder, 1
Bos. Pull. N.
R. 313.

Case of Brom-
field v. Crow-
der, 1 B. P.,
N. R. 313.
stated.

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Bromfield, provided he lived to attain the age of twenty-one years, otherwise such legacy was not to be paid or payable. And then he devised to his wife Elizabeth Davenport, all his real estate for her life, and after her decease to his cousin Joshua Rose, his heirs and assigns for ever. Afterwards he made a codicil to his will in these words: "With regard to that part of my will where I gave my estate to Joshua Rose, and his heirs for ever, in case he survives my present wife, now I entirely revoke the above part of my will, and only give Joshua Rose my estate during the term of his natural life, in case he survives Mrs. E. Davenport; and at the decease of Mrs. E. Davenport, and Mr. Joshua Rose, or the longest liver of them, I give all my real estate of what nature and kind soever to my godson John Davenport Bromfield, son of Charles Bromfield, of St. Ann's, Liverpool, if the said John Davenport Bromfield shall live to attain the age of twenty-one years; but in case he die before he attains that age, and his brother Charles shall survive him, in that case I give my real estate to Charles Bromfield, his brother, if he lives to attain the age of twenty-one years, but not otherwise; but in case both the above-mentioned boys die before either of them attain the age of twenty-one years, then I give my real estate to John Vale, &c. and his heirs for ever." The testator died, leaving Samuel Crowder his heir at law, &c.; then Elizabeth Davenport died, and Rose entered into possession and died, John Davenport Bromfield being then an infant under twenty-one years of age. John D. Bromfield by his next

friend filed his bill in Chancery against Crowder, Charles Bromfield and Vale claiming the estates, and praying amongst other things, that his right to them, on the death of Rose, might be declared, and the cause was heard and reheard before M. R., Crowder contending that the remainders to the Plaintiff, Charles Bromfield and John Vale, were contingent, and limited on the life estates of Elizabeth Davenport and Joshua Rose, which determined before the events happened on which the remainders were to become vested, and that the estates therefore belonged to him as heir at law. The question was, whether the words, "I give all my real estate, &c. to my godson John D. Bromfield, &c. if the said J. D. Bromfield shall live to attain the age of twenty-one years," gave an immediate vested estate. The Judges often certify without saying any thing; but this being a case of such consequence, Ch. J. Mansfield gave their opinion in open Court; and says "The fairest construction that can be put on this will, independent of authority, is that the Plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent. With respect to the cases, that of *Edwards v. Hammond* is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference, for it is clear that the testator meant no one to take his estate unless in the event of the Plaintiff dying under twenty-one. *Edwards v. Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word *if* implies a condition pre-

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“cedent, unless it be controlled by other words.
“But in this case there is a variance between the
“expression and the meaning, and the case of *Ed-wards v. Hammond* sanctions us in giving effect
“to the latter. On these grounds we are of opinion
“that the estate vested in the Plaintiff on the death
“of the preceding devisees; and the expression
“‘all my estate’ is so general as to pass an estate
“in fee. Besides, it would be an absurdity on the
“face of the will to construe it only an estate for
“life.” Mr. Leach rested on general reasoning
without discussing that case; but though he could
convince your Lordships that the decision was
wrong, it is now too late; the point is settled, and
can be altered only by the legislature. Mr. Richard-
son attempted to show some distinction between that
and the present case. But there is no difference that
ought to affect the ground of decision; otherwise
there can be no rule unless a will is exactly in the
same words as others. They say *at* may be con-
strued as *if*; I do not admit that, for *at* is more fa-
vourable for us. But at any rate *if* is the word in *Brom-
field v. Crowder*. Another case, stronger for the contin-
gency than the present, has been decided on the autho-
rity of *Bromfield v. Crowder*, *Doe, d. Hunt, v. Moore*,
14 East. 601. When that was first argued in K. B.,
Bromfield v. Crowder had been decided in C. P. and
in Chancery, and the Court of K. B. postponed the
decision till the House of Lords had decided the
case of *Bromfield v. Crowder*, and then that Court
decided on the same ground. The expressions in
that case of *Doe v. Moore* were, “I give and de-
“vise to J. Moore, &c. *when* he attains the age of

" twenty-one years, &c." and so to James, Robert, May 2, 7, 16,
 and Charles Moore. The testator died, and, the 1817.
 devisees being all under twenty-one, the heirs at DEWISE AT 21.
 law brought an ejectment, and the question was, —A CONDI-
 whether they took any and what estate or interest TION SUBSE-
 in the devised estates. Lord Ellenborough says, QUENT.
 " On behalf of the Plaintiff it was contended that
 " the devisee's attaining the age of twenty-one
 " years was a condition precedent to any estate
 " vesting in them, and that in the mean time the
 " same descended to the lessors of the Plaintiff who
 " were the heirs at law of the testator. And the
 " cases of a bequest of personal estate were relied
 " on where it has been held that a legacy given to
 " one if, or when he shall attain twenty-one, lapses
 " in the event of the legatee dying under twenty-
 " one. And *Stapleton v. Cheales*, Pre. Chan. 317.
 " *Goss v. Nelson*, 1 Bur. 226. as to what is there
 " said by Lord Mansfield respecting legacies, and
 " *Hanson v. Graham*, 6 Ves. jun. 239. were cited;
 " and it was argued that there was no distinction
 " between devises of real and bequests of personal
 " estate in this respect. But that is not so, for the
 " rules by which legacies are governed are borrowed
 " all, or the greater part, from the civil law; whereas
 " the decisions on devises of real estate have es-
 " tablished a different rule; and according to them
 " a devise to A. when he attains twenty-one, to hold
 " to him and his heirs, and if he die under twenty-
 " one, then over, does not make the devisee's attain-
 " ing twenty-one a condition precedent to the
 " vesting of the interest in him; but the dying
 " under twenty-one is a condition subsequent on

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TION SUBSE-
QUENT.

“ which the estate is to be divested, as in *Mansfield v. Dugard*, 1 Eq. Ca. Ab. 195.—*Edwards v. Hammond*, 3 Lev. 132. and *Bromfield v. Crowder*, 1 B. Pul. N. R. 313. which latter case was affirmed in the House of Lords. These we consider as authorities precisely in point, especially the last case, the pendency of which in the House of Lords was the occasion of our Judgment in this case being deferred. To which may be added *Goodtitle v. Whitby*, 1 Bur. 228. &c.” *Doe v. Moore* cannot be substantially distinguished from this. The words were equivalent to those here used, but expressed the contingency more strongly. The word in *Doe v. Moore*, is *when*, and in *Bromfield and Crowder*, it is *if*, both stronger for the contingency than *at*, which, they contend, is equivalent to *when* and *if*; and supposing it to be so, these cases are against them. No distinction has been stated applicable to the point in question, whether the remainder is vested or contingent. If your Lordships were to decide against us, you would reverse not only your own decision in *Bromfield v. Crowder*, but all the decisions that have proceeded on that authority. True, it is a question of intention, but it is also a question as to the technical effect of certain words. Mr. Richardson tries to embarrass the case by the supposition that some die before twenty-one; some not. I think the testatrix has not provided in all events for the issue of those dying before twenty-one, and the point was not in her contemplation. I think the first who attained twenty-one would take the whole and divest as the others attained that age; and if only one attained that age,

that he would retain the whole estate in fee to the disappointment of the children of those dying before twenty-one, leaving issue. "In case my said nephew shall die without lawful issue;" it is clear from the context that the word *issue* there means *children*. Mr. L. concedes that; Mr. R. not quite; then if it means issue generally, what becomes of the devise to those attaining twenty-one? But if it means children, all is consistent. It was not intended that the estate should go over to the Pinfolds, except in the event of the nephew Roake dying without issue, or leaving issue and the survivor of the children dying before twenty-one, the Pinfolds being then living, the children having the estate in the mean time.

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1817.
DEVISE AT 21.
—A CONDI-
TION SUBSE-
QUENT.

Mr. Marryatt. Both on principle and authority the point is clearly in our favour. It is argued to-day that Roake took an estate tail. Under what words? The devise is to him for life, remainder to his children as tenants in common in fee without preference given to the eldest. The ground is a general failure of issue under the words "in case my said nephew shall die without lawful issue." It is clear that issue there means children; and I could, if it were necessary, refer to a case where issue was held to mean sons, and not issue generally, *Foster v. Lord Romney*, 11 E. R. 594. The general result of the authorities is uniform for two centuries that when an estate of inheritance is given to a devisee when twenty-one, or at twenty-one, or if he should attain the age of twenty-one, it is a vested remainder defeasible on dying before twenty-one. The cases are collected in Fearn, Con. Rem. *Vid. Con.*

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Rem. 6 ed.
242.

Grant's case,
Vid. Cro. El.
189. Leon. 86.
Judgment,
that estate tail
was barred.

Vid. also as to
legacies
charged on
real estate.
Pawlett v.
Pawlett, 2
Vent. 336. 1
Vern. 304.
321. Fearnie,
6 ed. 555 n.

They cite only one case, Grant's case, 10 Coke, R. 50. f. as authority in their favour; the others being cited only to distinguish them from the present.

Whether that case was decided does not there appear; but it is in fact an additional authority that the estate vested immediately; for unless he had

then an estate of freehold, the fine could not operate at all. This much will be sufficient with respect to the authorities, after what has been al-

ready stated. As to the intent, they say that the testatrix intended to give no interest to Roake's children till they attained the age of twenty-one,

though at the time of making the will he was not married, and she contemplated the occurrences of twenty-two years after at least. The intent is to be

primarily regarded; and the general intent in preference to the particular. It is said that a devise at twenty-one imports no devise till twenty-one. There

is a distinction in equity as to bequests out of personal property founded on the civil law; but there is no instance in which freehold estate devised at

twenty-one does not vest immediately where the testator does not intend that the heir should take.

The inconvenience of a contrary construction appears from the present case. First, the primary intent of the testatrix would be defeated, as she gave the heir merely an estate for life, and their construction would enable him to procure the dominion

over the whole fee, which she never intended. Secondly, the children could not be of age for many years, and unless the remainder vested immediately, what was to become of the estate in the

mean time? It was clear she did not intend that it

should go to the heir at law. Roake at the date of May 2, 7, 18,
the will had no children, and in case of his dying 1817.
leaving children then all under twenty-one, did she
intend that they should be all excluded? Or that DEVISE AT 21.
those who should then be twenty-one should take —A CONDI-
the whole, to the exclusion of the rest? she having TION SUBSE-
said that they should all take equally. This is dis- QUENT.
tinctly in opposition to the primary object of the
testatrix. How is it consistent with the intent of
providing for all, that only one being of age at the
father's death should take to the exclusion of all the
rest not then twenty-one, though they might attain
it the next day or week? So that upon their con-
struction Roake and his children would take in a
way which she never intended. If it was a rule
that no words should make a condition precedent
against the intent of the testatrix, it was plain that
she intended that the estate should not go over if
Roake had any children, and that the remainder
should vest immediately in the children liable to be
defeated on their not attaining twenty-one.

Mr. Leach (in reply). The hardship of the case
can have no influence on your Lordships' Judgment,
though the party purchased under the advice of the
ablest lawyers in this country. But this is a case of
the first consequence in the construction of wills.
The particular expression must yield to the general
intent as collected from the whole of the will, and
it would be a novel construction that a testator did
not mean what he said, because a particular incon-
venience would arise. It is said that the case
has been decided by this House, and that the de-
cision must stand till controlled by the legislature.

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DEVISE AT 21.
—A CONDI-
TION SUBSE-
QUENT.

But I am not satisfied that it has been decided. The case is not the same in expression as that of *Bromfield v. Crowder*, and then the question is whether the principle applies. And how do they apply it? They weigh the particular expressions in both cases, and say they are of equal force. But the true mode is not to weigh one expression against another, but to try whether the expressions measured by the common standard lead to the same conclusion. And then they say that there is no authority to show, that if an estate is given at twenty-one, it does not mean that it is given before. Where is the ground of that argument? If they will look at all the authorities, they will find that a gift at twenty-one, standing *simpliciter*, is no gift till twenty-one; and such is the construction in *Grant's case*. The plain import of the expression here is, that the children should not take till twenty-one; and there is no other expression on the face of the will which controls that.

Judgment.

May 16, 1817.

Lord Eldon (C.) In either view of this case it is a case of hardship. If the fine should be destroyed, some of the parties' purchasers may be damnified; and if not, then the devisees will be deprived of the estates. But in the view of hardship, we have nothing to do with it: and after a careful consideration of the special verdict, and all that appears within the four corners of the instrument, the nature of the case, the authorities, and effect of the whole of the will, it is my humble opinion that this judgment ought to be affirmed.

Judgment AFFIRMED.

IRELAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

BISHOP OF KILDARE—*Plaintiff in error.*REV. T. SMYTH—*Defendant in error.*

UNDER the words of the charter of incorporation of the Dean and Chapter of the Cathedral Church of H. T., Dublin, ordaining that "the Archdeacon, &c. can and "may enjoy a stall in the choir, and a voice and place "in the chapter in all chapter acts," &c.—he has a voice in all its corporate acts, and not merely in the acts of that chapter considered as the Archbishop's council. And it seems he may vote by proxy.

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DEAN AND
CHAPTER.—
PROXY.—
PRACTICE.—
BILL OF EX-
CEPTIONS.

Though in a bill of exceptions to the directions of the Judge below, the evidence given at the trial upon which the allegation of error depended, was not set out at length; but parts of it, consisting of charters, entries, &c. were merely referred to, and the record appeared, on the transcript being brought up, to be so far defective; and though in strictness the House of Lords cannot proceed upon such a record, yet upon consent of the Counsel for both parties to select such parts as they meant to rely upon, the cause was heard and decided—the Lord Chancellor stating that a special entry should be made on the journals to guard against the mischief of such a precedent.

(N. B. The evidence was printed in an appendix to one of the cases.)

THIS was an action of trespass on the case brought in 1810, in the Exchequer (of Pleas), by Dr. Smyth, against the then Bishop of Kildare, for a false return to a writ of mandamus, and for damages on account of the injury sustained by him in consequence of the conduct of the Bishop, who was

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DEAN AND
CHAPTER.—
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BILL OF EX-
CEPTIONS.
Charters.

dean of the cathedral church of the Holy Trinity, Dublin, in refusing to admit Dr. Smyth to a prebendal stall of that chapter, to which he had, as he contended, been duly elected.

By a charter of 33 Hen. 8. and of 2 Jac. 1. reciting the previous charter, an ancient priory in the cathedral church of the Holy Trinity, Dublin, was changed into a dean and chapter; and by the latter charter the dean, precentor, chancellor, treasurer, and three canonical prebendaries (substituted for six vicars choral appointed by the previous charter), viz. of St. Michan's, St. Michael's, and St. John's, to each of which prebends were annexed the church and rectory of the same name, were incorporated by the name of "the dean and chapter of the cathedral church of the Holy Trinity, Dublin." It was ordained by the charters of Jac. 1. that when any of the prebends became vacant, the dean and chapter might elect any fit person to succeed, and in both charters it was ordained that "The Archdeacon of Dublin and his successors can and may enjoy a stall in the choir, and a voice and place in the chapter in all chapter acts in the aforesaid church of the Holy Trinity, Dublin, according to the honour and prerogative of his dignity."

Archdeacon
of Dublin to
have a voice
and place in
all chapter
acts.

In December, 1808 (Dr. Smyth being then prebendary of St. John's, admitted in 1803), the prebend of St. Michan's, the most valuable of the three, became vacant. And Dr. Smyth, and Dr. Graves (Prebendary of St. Michael's, admitted in 1801), being candidates, at a meeting of the dean and chapter, holden on the 16th February, 1809,

for the purpose of election, the dean and two others voted for Dr. Graves; and the Archdeacon (by proxy) and three others voted for Dr. Smyth, the Defendant in error. In the regular course he would have been immediately installed by the chapter, and presented, under the corporate seal, to the Archbishop of Dublin, to be by him admitted to the Rectory of St. Michan's. The Dean (Plaintiff in error) refused to admit him or to affix the corporate seal to the presentation; and Dr. Smyth having on the 18th May, 1809, obtained a writ of mandamus, directed to the dean and chapter to admit him, the Dean, without calling a meeting, returned that Dr. Smyth was not duly elected. The presentation then lapsed to the Archbishop, and, he having died, another person was presented by patent from the Crown, and admitted and instituted to the prebend and rectory of St. Michan's.

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CHAPTER.—
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CEPTIONS.
Election.

Mandamus.

Return.

Dr. Smyth then brought his action laying his damages at 10,000*l.*: and the Defendant in error having pleaded the general issue, the cause was tried, and the charters, &c. were given in evidence. It was contended for the Dean, that it appeared on the evidence that the Archdeacon was not entitled to vote in the election of a prebend; that, if he had the right in person, he was not entitled to vote by proxy: and, that from the usage since 1594, the jury might presume that there was some ancient bye-law under which Dr. Graves, as the senior prebendary, was entitled to succeed to the vacant prebend. On all these points the opinion of the Judge was against the Dean, and under his directions the Jury found for Dr. Smyth, damages

Action.

May 9, 16, 22, 1,600*l*. A bill of exceptions was at the trial tendered to the directions of the Judge, and sealed by him.

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CEPTIONS.

Judgment having been given for Dr. Smyth in the Exchequer, and Exchequer Chamber, a writ of error was brought in Dom. Proc., and the directions given by the Judge at the trial, and excepted to, were assigned for error.

Bill of excep-
tions.

This bill of exceptions did not set out the evidence at length (and this is the chief reason for mentioning the case here); but, as it appeared on the transcript of the record, merely referred to the charters and other documents in this manner.

Evidence not
fully set out in
bill of excep-
tions.

“ And upon the trial of the issue so joined as afore-
“ said, the Counsel for the Plaintiff, to maintain and
“ prove his issue on his part, produced and gave in
“ evidence a charter of the tenth May, thirty-third
“ Henry the Eighth (*prout the charter*). A char-
“ ter of the twelfth June, second James the First
“ (*prout the charter*). An act of the ninth of
“ William the Third (*prout the act*), &c. And
“ the said counsel then and there further produced
“ and gave in evidence the books containing the
“ chapter acts of the said dean and chapter, &c.
“ and read therefrom the following entries (*prout*
“ *entries*),” &c. &c. The record, therefore, not
containing the evidence as it was given before the
Jury, a difficulty arose as to whether the House
could give judgment upon such a record. It was
contended for the Plaintiff in error, that as there
was no record except this before the Court below,
he could not allege diminution, nor bring the case
before their Lordships in a more regular way. For

Difficulty.

Diminution.

the Defendant in error it was contended that it was incumbent on the person tendering a bill of exceptions to take care that it should be regularly made up. He must show, that for matter appearing on the face of the record, the Defendant in error was not entitled; and if the record was not such as to enable him to show that, the judgment ought to be affirmed. It was stated, however, for both parties, that they were willing to settle by consent what parts of the evidence should be taken and relied upon.

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CHAPTER.—
PROXY.—
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CEPTIONS.

Consent.

Lord Eldon (C.) Strictly the House cannot proceed on such a record; but it may be explained by agreement between the parties. You may, therefore, agree as to what parts of the evidence you mean to take and rely upon; and a special entry may be made on the journals to prevent the mischief of such a precedent.

Strictly the House could not proceed on such a record, but it may be explained by agreement and consent of parties.

The cause was afterwards heard, and it was contended for the Plaintiff in error, that the meaning of the charters was, that the Archdeacon should have "a place and voice in the chapter in all chapter acts," only when the Chapter acted as the Archbishop's Council, and not when it acted as a corporate body: that the Archdeacon was not a member of the corporation, that he was neither prebendary nor canon, and had no share in the property; and could not vote in any corporate act, such as the election of a prebendary, either in person or by proxy: that he was himself only the delegate of the Archbishop, and could not vote by delegate.

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1817.

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PROXY.—
PRACTICE.—
BILL OF EX-
CEPTIONS.

BYE LAW.

3 Burr. 1833.

— Butler v.

Palmer, Salk.

190.—Barber

v. Boulton,

1 Str. 314.—

The King v.

Castle, And.

119.—Tucker

v. the King,

4 Bro. P. C.

455.

PROXY.

Chichester

(Bishop) v.

Harward,

1 T. R. 652.

Judgment.

May 22, 1817.

Charter.

And then it was contended that the supposed by-law was legal and consistent with the charters. It is unnecessary to state the arguments on each of these points at length, as the judgment turned entirely upon the ground, that "*chapter acts*" in the charters, meant all chapter acts whatever: and the Lord Chancellor asked whether, if the King had said that the Archbishop himself should have a seat in the chapter, there could be any objection to it. The Counsel for the Defendant in error were not heard.

Lord Eldon (C.) The case has been as ably argued for the Plaintiff in error as it can possibly be. But the question does not depend upon whether the Archdeacon was or was not a corporator, but upon the particular clause of this charter; which ordains that "he can and may enjoy a stall in the choir, and a voice and place in the chapter *in all chapter acts*."

Lord Redesdale. I concur in that opinion. In reading the charter, I find that the Archdeacon is to have a voice and place in all capitular acts, and this is a capitular act.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TOWART—*Appellant.*SELLARS—*Respondent.*

In support of an action brought in 1808 to reduce certain deeds executed by M. between 1782 and 1799, upon the ground of the insanity of M. the granter; parole evidence given that he was quite deranged from 1781 till his death in 1804; the evidence applying to his insanity generally, and not to the particular moments when the deeds were executed. This evidence encountered by parole evidence of his general sanity during the same period; and this latter evidence corroborated by notes or receipts written by M. having reference to the contents of the deeds; and showing that he understood their nature and effect; and also by the deeds themselves, which were rational in his circumstances; corroborated also by the circumstances that the deeds were attested by witnesses of unimpeached credit, and that M. had been in 1784 served heir, and infeft in the subjects conveyed by the deeds, and had then sold part of the lands, and mortgaged the remainder, &c. these transactions proceeding on the supposition of his sanity, and remaining unchallenged. Held by the House of Lords, reversing the judgment below, that the deeds were good.

May 16, 1817.

INSANITY.

The *Lord Chancellor* observing, that supposing M. to be weak or even insane, if he was sane at the time of executing the deeds, that was sufficient to support them: and that the distance of time between the period of their execution and that at which they were challenged was a material consideration; and, that if the deeds had been bad as titles, they could not have been good as securities. *Lord Redesdale* observing, that if deeds were to be reduced on the ground of utter incapacity, they could not stand for any purpose; that in order to discover the truth from conflicting evidence, it is proper to try it by the test of collateral circumstances, the truth of which is unquestion-

May 16, 1817.

INSANITY.

able; and that these circumstances in this case were inconsistent with the evidence of notorious incapacity in M.; and that the attesting witnesses to some of the deeds being dead, it must be taken that they would have sworn to the sanity.

THIS was an action brought by the Respondent, as heir and executor to James Maitland, deceased, to reduce certain deeds which had been granted by Maitland to the Appellant, on the ground of the insanity of Maitland at the time of their execution.

Trust Deed,
Dec. 20, 1783.

Maitland, being entitled in possession to an heritable property of twenty acres of land in the vicinity of Glasgow, in 1783, executed a trust disposition of his property to his maternal grandfather, and two other persons who had been friends of his father; the purpose of the trust being to pay the granter's debts, wind up his affairs, and pay him the residue. The Appellant, who in the same year, 1783, had married Maitland's only sister (he had no brothers), brought an action against him for his wife's share of the father's executry, which Maitland compromised for 300*l.*; and in July, 1784, the trustees, with Maitland's concurrence, upon conditions stated in a deed of May 14, 1784, divested themselves of the trust in favour of the Appellant and his wife. And in August, 1784, Maitland executed a deed of renunciation and discharge and disposition of the whole right and property in the lands to the Appellant and his wife, under the burden of paying 100*l.* to one Armour, to whom he had mortgaged the property for that sum, and all other just demands, and of allowing him an an-

Deeds, May
14, and July
6, 1784.—
Devolution
of the trust.

August 28,
1784. Deed
of renuncia-
tion by M.

nuity of 13*l*. for his maintenance. The wife died May 16, 1817. in 1793 without issue; and, in July, 1798, the Appellant obtained from Maitland a general irrevocable disposition *mortis causa*, of the whole property heritable and moveable which he then had, or might possess, or be entitled to, at the time of his death.

INSANITY.

July 17, 1798. *Mortis causa* disposition.

In 1804 or 1805 Maitland died, and in 1808 the action was brought to reduce these deeds. The insanity being denied, a proof was allowed, and a great number of witnesses were examined on each side. Those adduced on the part of the pursuer deponed, that till 1780 or 1781, Maitland (or Maiklem) was a decent man, but from that time he became quite deranged; that he attempted to cut his own throat, and to burn the house; that he enlisted as a soldier, but was incapable of doing the exercise; that he was unfit for the common operations of field labour; that he was generally known by the name of *daft laird Maiklem*, and never recovered his senses. On the other hand, the witnesses for the Defender, including two attesting witnesses to the deed of 1798, deposed that Maitland was of perfectly sound mind, intelligent, and even acute in business when sober, but that he was much addicted to drinking, and often intoxicated.

Alleged insanity.

The Court below, by interlocutors February 3 and May 24, 1814, sustained the reasons of reduction as to the deeds of August, 1784, and July, 1798; and also reduced the other deeds challenged as titles to the subjects in question, and found that they could only be considered as securities entitling

Interlocutors Feb. 3, and May 24, 1814, reducing all the deeds as titles, but sustaining some of them as securities.

May 16, 1817. the Defender to be heard in accounting. From this judgment the Defender Towart appealed.

INSANITY.
Action of
count and
reckoning,
1807.

It ought to be noticed that Sellars, not being then aware, it seems, of the existence of the deeds disposing the absolute right, in 1807, before instituting this action of reduction, had brought an action of count and reckoning against Towart for his intromissions with the rents under the devolution of the trust in 1784; which must have proceeded on the supposition that the trust deeds were valid.

Delay.

Another material circumstance was that the Respondent might, as Maitland's next male agnate, have brought him in 1780, or any subsequent period, before a Jury, to have his insanity legally ascertained, if he was insane; but had never started the question till 1807 or 1808, about two or three years after Maitland's death.

As to the alleged insanity, the cases of *Arbuthnot (Viscount) v. Sime*, 1796—*Douglas v. Douglas*, 1771—*Dewar v. Dewar*, 1808—and the English case of *Faulders v. Silk*, in K. B. 9th December, 1811—were cited.

Evidence.
Admissibility.
Confidential
agency. In-
terest, &c.

The Appellant offered in proof the deposition of his law agent, Mr. Peterson; but this was objected to:—1st, Because he was the Appellant's confidential agent:—2d, Because he had an interest in the issue of the cause, the interest being that he held an heritable security granted by the Appellant over the property, and was cautioner for loosening the arrestments which the Respondent had used in the hands of the tenants on the property pending the suit. As to this objection, the cases of *Adam v.*

Bruce, Kilk, 1743—*Govan v. Young*, 1752— May 16, 1817.
Stewart v. Montgomery, 1677, Dict. vol. ii. 256 INSANITY.
 —*M'Alpin v. M'Alpin*, September 2, 1806—
M'Gregor v. M'Gregor, 11th July, 1801—
v. Brand, 27th November, 1771—were cited. The Court, 10th July, 1812, refused to admit the evidence *in hoc statu*, and there was no further proceeding on that point.

The Appellant also offered in proof the deposition of Mr. Mark Reid, one of the witnesses to the deed of August 28, 1784, which had been taken in the presence of a magistrate and two witnesses in 1807; Reid being then eighty-three years of age, and in a declining state of health, and having died before the action of reduction was brought. The Lord Ordinary refused to admit the deposition or the evidence of the magistrate and witnesses as to its contents; and a petition having been presented to the Court, the Lords, June 5, 1812, “superseded, determining on the prayer of the petition until the state of the process should be before the Court for advising.” But no further judgment was given on that point.

Sir S. Romilly and *Mr. Clason* for Appellant;
Mr. Leach and *Mr. Brougham* for Respondent.

Lord Eldon, C. (after stating the case). I do Judgment.
 agree that this is an extremely important case; for, May 16,
 as on the one hand, justice is always anxious to 1817.
 protect persons of weak minds from their own acts;
 and, where insanity is established at the time when
 deeds are executed, will set them aside, whether in

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INSANITY.

Faulder v.
Silk, in K. B.
Dec. 9, 1811.

The question
in these cases
is whether a
man is insane
at the time of
executing the
deed.

Delay in chal-
lenging the
deeds a mate-
rial circum-
stance.

their nature such as ought to be executed or not : so on the other hand, if a man of weak intellect executes a deed which would not be improper if executed by a man of the strongest mind, it is not for us to say that, because God has at one moment afflicted a person with such a malady, he shall, therefore, never be restored so as to be competent effectually to do an act which a moral and good man would think it most proper to do. The principle in our law is clear ; and I do not know any difference in that respect between the principle of our law and that of the law of Scotland. I remember the case of a gentleman who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a disposition of his property which was exactly that which he ought to have made, having regard to the circumstance that he had before provided for some members, and not for other members of his family ; and that which he, before his insanity, communicated to a friend, he intended to make : and he did it under a sense of his situation, and the impression that no time was to be lost, and to protect himself against a relapse. That was held to be a good deed. For the question is not, whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed which ought to give it effect.

Another principle which we may safely lay down is this : if property has been disposed of twenty or thirty years before, formally, and with the concurrence and assistance of individuals of good character ; and if that disposition is not quarrelled with as speedily as

may be, and only challenged when the parties best acquainted with the whole circumstances of the transaction are dead and gone, it is dangerous to set aside that disposition, at the distance of twenty or thirty years, upon a ground so fallible as human memory, and testimony as to the state of the person making that disposition at other moments, without at all applying to the moment when he executes the deed.

May 16, 1817.

INSANITY.

After these general observations, see what these deeds are. On the 20th December, 1783, he makes a disposition of his property, proceeding upon a narrative of Maitland. "That I am at present owing to sundry persons considerable sums of money which I am unable to repay; but which it is most just and reasonable should be paid and discharged as soon as possible; that I have no other fund for that purpose but the heritable subjects after described, from which I expect a considerable reversion will arise to me after payment of my debts: but from my particular situation, at present, I incline to trust the management of my affairs to the persons after named, my creditors and friends, in whom I have an entire confidence." What the particular situation was I do not know; the witnesses are in their graves: but one of the witnesses to the deed of 1798, in which he recites that he was apt to be made the worse of liquor, and to be imposed upon by designing persons, says that he read it over himself, took it away with him, and kept it by him for some time, and at a second meeting executed it. In the recital to this deed of 20th

Trust Deed,
Dec. 20,
1783.

May 16, 1817. **INSANITY.** December, 1783, he might perhaps allude to the calamity with which he had been afflicted. But if God afflicted me two years before with such a calamity, and I made a disposition of my property, reciting that I was afraid of the consequences of a relapse, whether it were the fear of imprudence, as in the Middleton case, or the fear of disease; is it to be held that because a man recites that reason for doing the very thing which he ought to do, he is therefore not sufficiently recovered to render him competent to do that act? Then the narrative proceeds:—"Therefore, I do hereby with the special advice and consent of James Blair, my grandfather, &c.;" so that he was acting by the advice and with the consent of his grandfather: Glen and Scott, who in this year, 1783, had been engaged in many transactions with Maitland, making no objection; and this is no small circumstance in the absence of other evidence as to his state of mind at the moment of executing the deed. The trustees were in the first place to sell parts of the property for payment of the granter's debts, *without any control from him*. That clause is not uncommon in instruments in this part of the island, and here again I refer to the case of the Chirk Castle estate.

Middleton v. Kenyon (Ld.), 2 Ves. Jun. 391.

Middleton v. Kenyon (Ld.), 2 Ves. Jun. 391.

I wish to call your Lordships' attention particularly to this fact, that at the time the deed was executed, he was aware that he had to defend suits carried on against him by this Towart; and there was a special provision in the deed, that the trustees should be at liberty to defend the two processes, one before the Court of Session, the other before

the Magistrates of Glasgow. This deed appears to have been executed with great particularity as to the date, the names of the witnesses, and the name of the writer of the deed. Then, with reference to this deed of December, 1783, Glen and Scott, who had been concerned with the granter in that year in certain bills of exchange, and transactions of business; and who, as far as we know, were respectable persons, are parties to it, and they are to sell and pay his debts, and give the reversion to the granter; and all this with the concurrence of his grandfather.

May 16, 1817.

INSANITY.

Then it is said that Maitland enlisted as a soldier, and was unable to do his exercise, a defect which I have known to belong to many worthy and sensible men. And they fix upon certain acts which might be material if they had applied to the moment of executing the deed.

Then the deed of 6th July, 1784, proceeding upon the narrative of the trust deed of 1783, and the purpose for which it was granted, was executed. It does not appear that Maitland himself was a party to this deed. But then consider what a man may rationally do. Blair, the grandfather, Glen, and Scott, had no authority to execute this deed of July, 1784, unless they had the consent of Maitland; and you must suppose that they were satisfied that they had his consent, unless they meant to be responsible for the acts of Towart and his wife, which, without that consent, they would be.

Deed, July 6, 1784.

Then the deed of August 28, 1784, was executed; and from this it appears that Maitland was served heir to his grandfather, and duly infeft on the

Deed, August 28, 1784.

May 16, 1817. **INSANITY.** 17th August, 1784, a circumstance of great importance, though not noticed in the reasoning; and what follows upon that? A sale of a certain parcel of the land to one Armour, and a wadset for 100*l.* on the 18th of August. Is not this a transaction that deserved some attention? One who was supposed to be insane, served heir to his grandfather, and infest on the 17th August, and selling and mortgaging his property on the 18th! And you are to suppose that Armour made no inquiries! Then it recites that the debts which he owed had been paid by Towart; and here be it noticed that Glen was a creditor to the amount of 144*l.* and was paid his debt under these instruments; and then he conveys the property to his sister and her husband, subject to the payment of the 100*l.* mortgage money, and of an annuity of 13*l.* and 3*l.* per annum for clothes to himself.

It was said that he would not have executed this deed if he had not been insane. Now I do not say that if he had been insane the deed would have stood, though the consideration had been more than sufficient. But still that is a circumstance to be attended to; and the only evidence we have here is, that the consideration was more than sufficient. But if it had been less, he might have intended to make a gift to his sister and her husband; and a payment of this description was well enough calculated for a person in his situation, and the use which he made of money when he received it. Before the commencement of this process, all the witnesses to this deed were dead, except one of the name of Reid. Reid also died before he could be

examined in the cause ; but he had been examined on this subject before a Magistrate of Glasgow and two witnesses. His deposition was not admitted ; but the objection to it might have been waived, and there appears to have been no bad reason for insisting upon it.

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We have no means, therefore, of knowing the state of Maitland's mind, except from these deeds themselves and the parole evidence, till the execution of the deed of 1798, which was a *mortis causa* disposition. This deed bears on the face of it that Maitland had favour and affection for his sister ; and one of the witnesses speaks to the admission by Maitland, that he in fact had that favour and affection. The witnesses say that he read this disposition aloud, that he said he would think about it, took it away with him, and afterwards signed it. Then, as to the only instrument the witnesses to which were alive, they speak to his sanity ; and, though they might have judged wrong, they must have been convinced that he was of sane mind when he executed it. This deed professes to give over all the property and all claims which he then had, or might have at the time of his death ; and then he states that he was apt to be made the worse of liquor, and liable to be imposed upon, and therefore does this act. And is it to be said that, because he chooses to allege that reason which is the true one, therefore this and the other deeds are bad, though not quarrelled with till 1808, the Respondent being in a situation which enabled him to challenge them at a much earlier period ?

Deed, 1798.

Then the case comes to this, supposing Maitland The general

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INSANITY.

insanity of a man is not sufficient to set aside a deed executed by him, if he was sane at the time of execution.

to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. And the question is whether this mass of written evidence in support of his sanity at the moment when these deeds were executed, which cannot now have its full weight, but which must be considered as at any time very weighty, is so affected by the parole testimony of persons speaking to his condition at other times, that you can say, at the risk of what belongs to such a decision, that the deeds were executed by a man, not by one liable to be imposed upon, for that is not this case, but by a man entirely incompetent to do such an act.

It often happens in these cases, that when witnesses are describing the condition in which the man was two or three years before, there are no cases more difficult to deal with; the witnesses on the one side describing him as being as mad as mad can be; and those on the other side representing him as a man of the strongest and soundest intellect. Like the smuggling cases which we sometimes had in the Exchequer, where the question was, whether a vessel was within three leagues of the coast with barrels of a certain size, while the evidence on one side was that she was not three leagues from the coast; the evidence on the other side generally was, that she was at least twenty leagues from it. So in these cases the witnesses on the one side swear that the person whose sanity is in dispute, was one of the weakest; and those on the other side swear that he was one of the strongest minded men that ever existed. But the

question is not whether this man was weak, or whether he was mad when in liquor, or insane at other times; but whether in 1817, where the deeds challenged are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who give testimony which would support that deed in any case, whether you can say that these deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles), at such a distance of time, and under such circumstances. In my opinion, that would not be safe, and I cannot consent that this judgment should be affirmed.

May 16, 1817.

INSANITY.

Lord Redesdale. I concur in that opinion, and I confess this case appears to me very important. With regard to the words in one of the deeds, that the trustees were to act without control, they are not uncommon in English deeds of this nature. As to the decision of the Court below, that must be varied even on its own principle. It is uncertain, for one cannot see what are the deeds impeached by it; and it is inconsistent, because the deeds, if to be reduced on the ground of utter incapacity, cannot stand for any purpose.

Deeds reduced on the ground of utter incapacity, cannot stand for any purpose.

The deeds are impeached by parole evidence only, which is an important circumstance; and that evidence is applied generally, and not particularly to the time when the deeds were executed. The allegation is, that since 1781 or 1782, Maitland was utterly incompetent to execute any instrument, and that was attempted to be made out by parole evidence without any qualification whatever. But on that case the

May 16, 1817. Court below has not decided. On the other side there is likewise strong parole evidence.

INSANITY.
To find the truth from contradictory evidence, try the evidence by the test of collateral circumstances, as to which there can be no doubt.

Action of count and reckoning, 1807.

Now in endeavouring to find out the truth from contradictory evidence, try the evidence by the test of collateral circumstances, as to which there can be no doubt, in order to ascertain how far it is consistent with these circumstances. Having gained this ground, we have all that is necessary to dispose of the cause; for, when the evidence is so tried, it appears clear that the Respondent's evidence cannot be true, and that the Appellant's evidence may be true. The evidence of the Respondent's witnesses is inconsistent with the collateral circumstances. They represent him as utterly incompetent from 1782. Now in the first proceeding the Respondent did not quarrel with the deed of December, 1783; so that he then had no conception that Maitland was, at the time of the execution of that deed, in the state of mind which he afterwards attributed to him. The Respondent did not then pretend to reduce that deed, but treated it as a rational deed executed by the advice and with the concurrence of respectable persons; and it appears that about that time Maitland was engaged in a variety of dealings, utterly inconsistent with the evidence of notorious incapacity. The deed of the 14th May, 1784, was executed by the grandfather, and Glen and Scott, and was sustainable on the same grounds as that of 1783. Now what appears from that deed?—1. That Maitland had executed a bond for what was due to his sister. That was a distinct instrument, executed with the approbation of his grandfather and the other trustees. Do they not declare, then, that he was

competent? They had engaged to defend the suit, and this was a compromise of it. The persons who prepared these deeds, and who were parties and witnesses to them, were dead when this process commenced; and we must take it that they would have sworn that he was competent; for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August, 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe if that were not a principle of law. But the matter does not stop there. Part of the consideration in this deed is 5*s.* a week, or 13*l.* a year, to be paid to Maitland. Now it is in evidence that he was in the habit of receiving this 5*s.* a week under this deed; and the notes he gives acknowledging the receipt written by himself are in evidence; and from them it is demonstrable that Maitland was not in the condition in which he was represented to be by the Respondent's witnesses; for these notes show that he was capable of knowing what he received and ought to receive. He writes acknowledging the receipt of what was due to him, and expresses his hope that his sister and her child are well. Is that the language of a man in such a state that he could do no rational act? This written evidence is worth a host of parole testimony, as it demonstrates that the evidence for the Respondent cannot be true.

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INSANITY.

It must be taken that the persons who prepared and witnessed, and were parties to the deeds, would, if alive, have sworn to the sanity of M. at the time when the deeds were executed.

The next point is the consideration. It has been said that the property was more valuable than the consideration paid for it; and, with reference to that,

Consideration.

May 16, 1817. it ought to be recollected that there was a diminution of ten acres sold to Armour. That too is a transaction in which other persons were concerned as well as Armour who advanced the money, and all of them are in effect witnesses of Maitland's sanity; and it was impossible they could have so acted if this man had been, as the Respondent's witnesses represented him to be, notoriously insane.

Delay in challenging the deeds.

The length of time too that elapsed from 1784 till 1807 was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is to impeach all these transactions. If then the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807 or 1808, when the value was so different? The delay too had a tendency to deprive the Appellant of the means of showing that Maitland was of sound mind at the time of executing the deeds; and in that view also, the length of time is an important feature in the case.

Upon the whole, therefore, it appears to me that the decision of the Court below cannot be sustained. It is not consistent with the nature of the proceeding which impeaches these deeds on the ground of utter incapacity since 1782. But the judgment does not apply to that case, as it sustains the deeds to a certain extent. The result is, that the evidence for the Respondent is not sufficient to reduce these deeds. There is positive evidence to support them,

tion and sustained the defences, and Johnston appealed. June 9, 11,
July 3, 1817.

SECOND CAUSE.

ARBITRA-
TION.

Mr. Johnston the Appellant, and the Respondents Messrs. Cheape, Wemyss, Heriot, and Buist, having lands on the banks of the river Eden, in Fife, engaged, by signing a minute to that effect in April, 1810, with a view to the improvement of their lands, to deepen the channel of the river, and remove a bridge, and erect another, and that a neighbouring gentleman well known to them all for his skill in such matters, should be empowered to execute the work, and settle the proportions of the expense; and a submission was accordingly prepared reciting the proposed objects, and then proceeding in these terms: "and having confidence
" in the judgment of Andrew Thomson, Esq. of
" Kinloch, for getting these improvements carried
" properly into effect, therefore we do hereby give,
" grant, and commit full power, warrant, and authority to the said Andrew Thomson, as sole
" arbiter chosen by us, to get the said bridge over
" the river Eden, near the village of Kettle, removed, and a new one erected to the westward
" of that bridge; to cause the said river to be
" deepened and widened at and above the said old
" bridge (beginning as near to it as can be done, and
" at the same time obtain a proper level) upwards
" to where the Rossie Drain falls into the said river,
" and to get the river between these two points
" embanked, and what other improvements executed
" he may deem necessary for completing the object
" in view, and that in any manner he may think

Submission.

June 9, 11,
July 8, 1817.

ARBITRA-
TION.

“ proper, and with power to him to enter into con-
“ tracts with workmen for finishing said works, and
“ to proportion the expense of the said improve-
“ ments among us as he shall conceive just and
“ reasonable, according to the benefit which the
“ lands belonging to or possessed by each of us will
“ derive therefrom, and also with power to the said
“ arbiter to take all manner of probation, and to
“ direct measurements and valuations to be made,
“ and do every thing else necessary, or that he
“ should think proper, for enabling him to decide
“ and determine in the matter hereby submitted
“ and referred to him; and whatever the said arbiter
“ shall decide and determine by decreet arbitral to
“ be pronounced by him betwixt and the day
“ of or between and any farther day to which
“ this submission may be prorogated, and which he
“ is hereby empowered to do at pleasure: We
“ hereby bind and oblige ourselves, our heirs, and
“ successors, to acquiesce in, impliment, and per-
“ form, under the penalty of 100*l.* sterling, to be
“ paid by the party failing to the party observing,
“ or willing to observe the same over and above
“ performance; and we bind and oblige ourselves
“ and our foresaids respectively to keep the said
“ river and the banks thereof, after the said im-
“ provements are completed, opposite to the lands
“ belonging to or possessed by each between the
“ above-mentioned points, and which are to be
“ thereby benefited, in good and sufficient con-
“ dition and repair in all time thereafter, so that
“ none of the lands belonging to or possessed by
“ any of the parties in this submission can be in,

Arbiter in his award goes beyond the limits of the submission: this does not vitiate the whole award, but the excess held *pro non scripto*, and the award good to the extent of the power.

June 9, 11,
July 8, 1817.

ARBITRA-
TION.

FIRST CAUSE.

THE Appellant Johnston, in 1813, brought an action to reduce an award against the Respondents Cheape and the arbiter. The award was founded on a submission between Johnston and Cheape, empowering Thomson as arbiter to decide the proportion to be paid by each of them of the expense of deepening a drain called Rossie Drain, "from the point where it falls into the Eden up to the march between our properties at Bowhouse Moss," and of keeping clear the said drain "between the aforesaid points" in all time coming. The submission proceeded on a recital of confidence in Thomson as a fit person to determine the value of the operation to their respective properties, and to ascertain the proportion of the expense which each ought to pay. The reasons of reduction were in substance corruption, partiality, and interest, in the arbiter, and also excess in the award, the arbiter having charged the Appellant with the expense of deepening a part of the drain which lay beyond the points limited by the submission. The interest consisted in this, that the arbiter's own lands would be benefited by deepening the drain; and it was alleged that there was "strong reason to believe" that the arbiter was actuated by a corrupt motive arising from a private transaction or understanding

Action, 1813,
to reduce an
award.

Submission.

Reasons of re-
duction.

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TION.

between him and Cheape, relative to the draining of the arbiter's own lands, by which the expense would be diminished to the arbiter in proportion as it should be diminished to Cheape in respect of the operation in question. The circumstances alleged in support of the charge of partiality, were the refusal by the arbiter to receive evidence of material facts which the Appellant brought under his view, and offered to prove, and his refusal to communicate to the Appellant the notes of his opinion, or a draft of the decree arbitral before it was pronounced. And the cases of *Blair*, Jan. 1738—*Wallace v. Wallace*, Feb. 1762—*Williamson*, 1766—*Logan v. Lang*, Nov. 1798—and *Elliot v. Elliot*, 1789—were cited.

Defences.

In defence it was stated that the reason why the arbiter has refused to communicate his notes or a draft was, that, though often employed as an arbiter, he had never been accustomed to do so, and that he had refused the evidence because, from his own knowledge of such matters, he had no doubt as to the effect of the operation on the respective properties of the parties; that as to the matter of interest, he had no interest in the subject that was not well known to the parties when they subscribed the submission. It was denied that there was any transaction or understanding of the nature stated by the Appellant, or that there was any partiality or corruption, or any excess in the award. But if there was an excess, that might be rectified without affecting the rest of the award. (*Vid.* the next cause.)

May 12, June
7, July 1,
1814.

The Court below repelled the reasons of reduc-

as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or at least that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is on the one side clear positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of a doubtful balance of testimony, but the Appellant's evidence is decidedly the stronger.

May 16, 1817.
INSANITY.

Judgment of the Court below REVERSED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JOHNSTON—*Appellant*.

CHEAPE and another—*Respondents*.

AND

JOHNSTON—*Appellant*.

CHEAPE and others—*Respondents*.

ARBITER, well known to the parties for his skill in June 9, 11,
the subject of reference, acting under submissions re- July 8, 1817.

June 9, 11,
July 8, 1817.

ARBITRA-
TION.

citing that the parties had "confidence in him as a fit person," and had "confidence in his judgment" to carry into effect certain improvements upon lands, and apportion the expense among the parties, refuses to communicate the notes of his opinion, or a draft of the award, before it was pronounced to one of the parties applying for such notes or draft, and refuses to receive proof of alleged material facts laid before him by the same party; he being himself a competent judge of the subject, and chosen for that reason, and having no doubt in his mind; the award was held good, notwithstanding such refusal: for, (*per* Lord Eldon, C.) an arbiter is not bound in all cases to receive evidence, whether it will have any effect on his mind or not. But even by the law of Scotland, which attaches so much value to arbitration, a refusal by an arbiter to receive proof where proof is necessary, may amount to what they would consider as a ground for setting aside an award. (*Vid.* *Sharpe v. Bickerdyke, ante*, vol. iii. p. 142.)

An arbiter has an interest in the subject of reference, and this is well known to the parties before they sign the submission; the award is good, notwithstanding the interest.

Five parties agree to refer the direction of certain extensive improvements, and the apportioning of the expense among them, to an arbiter, the submission bearing that the award is to be pronounced "betwixt and the day of " (omitting the usual words, *next to come*), "or " between any farther day to which this submission may " be prorogated, and which he (the arbiter) is hereby " empowered to do at pleasure." Three of the parties sign the submission in March, 1811. The arbiter prorogated the submission on the 8th November, 1811, and 2d November, 1812. The two other parties signed the submission, one on the 20th March, the other on the 9th April, 1813, and the award was pronounced in May, 1813, when the work was completed. One of the parties who first signed endeavours to get rid of the award on the ground that the legal time had expired, the prorogations being ineffectual because two of the parties had not signed the submission till after the date of the last of them. But held that as the party had seen the work going on in the interval between 1811 and 1813, without intimating any such objection, he must be considered as having waived it, and should not be permitted to take advantage of it after the completion of the work.

because, although it was there decided that a submission does not expire until a year from the date of the last subscription, that subscription was within a year of the first subscription, all the parties having subscribed within a few weeks of each other, whereas here the last subscription was not within a year of the first; and, as the arbiter's power where the day is left blank is limited to a year, the submission fell, and no award could be made upon it; and the orders of prorogation were ineffectual, because the arbiter had no power to make any such order till all the parties had subscribed. 2d, The decret arbitral being a nullity, could not be homologated. 3d, That the award was *ultra vires* on the ground mentioned in the reason of reduction; and that, supposing it were not *ultra vires*, the arbiter had done injustice in leaving out of that part of the award the words "to be thereby benefited." 4th, That the refusal to receive the Appellant's evidence indicated partiality and corruption, and it had lately been decided in Dom. Proc. in *Sharpe v. Bykerdyke*, that an award could not stand where an arbiter did not receive material evidence tendered; the principle of that decision was, that it was essential in the nature of an award that the arbiter should hear both sides. 5th, The arbiter had an interest in the matter which was unknown to some of those who chose him judge; and the Court below refused a diligence to produce an agreement to show that he had a direct interest, and it must be taken that he had.

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ARBITRA-
TION.

Sharpe v.
Bykerdyke,
ante, vol. iii.
p. 102.

For the Respondent it was contended: 1. As to the point of corruption and refusal of the evi-

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TION.

Interest. *Vid.*
Mathew v.
Allerton, 4
Mod. 226.—
Comb. 218.

dence, that the evidence had been heard, although the arbiter, as he was entitled to do, acted on his own judgment. (*Kirkaldy v. Dalgairns*, Jan. 1809.) There might be cases where the rejection of material evidence might indicate corruption, so as to afford a ground to set aside an award; but here the arbiter was chosen expressly for his own skill in such matters, and the whole was referred to his discretion: he heard all that he thought of consequence, and decided on his own opinion. There was nothing that indicated a corrupt motive; and by the law of Scotland, if the arbiter acted *bonâ fide*, the award could not be set aside. The regulation of 1695, which was sanctioned by act of parliament, was directed against such cases as this. As to the case of *Sharpe v. Bickerdyke*, that was a case of falsehood, and depended on very particular circumstances. But this award might be supported even in this country. 2. As to the question of interest, it was no more than this, that the arbiter might wish to deepen his own drain, and that those operations would be of advantage to him if he did. But the parties were aware of that interest when they chose him, and the objection amounted to nothing. 3. If the award was *ultra vires*, it might be reduced *pro tanto*, without affecting the rest. (*Montgomery v. Strang*, June, 1798—*Kyd v. Paterson*, Fac. Coll., June, 1810.) 4. That although the usual way was to insert in submissions after the blank for the day, the words *next to come*, which confined the submission to a year, these words had been omitted here. Why? because it was known that the work could not be finished, nor the award

“ parties in the submission shall be injured by June 9, 11,
July 8, 1817.
 “ neglecting such repairs otherwise, I hereby decern
 “ and ordain the person or persons failing so to do, ARBITRA-
TION.
 “ not only to perform these stipulations, but also to
 “ pay whatever damage may be sustained by any of
 “ the other parties in consequence of such neglect,
 “ as the same may be ascertained by fit neutral
 “ men.”

Mr. Johnston, in 1813, brought an action against Action to re-
duce the
award.
 the other parties and the arbiter, to reduce the
 award for these reasons: 1st, (Reason of style). 2d, Reasons of re-
duction.
 That the award was void; the term of the submission
 having expired as to him before it was pronounced,
 and the prorogations having no effect because they
 could not apply to the supposed submission amongst
 five parties upon which the decree proceeded, two
 of the parties not having signed till after the date of
 the last prorogation. 3d, That the decree was *ultra*
vires, in ordaining that the parties should keep the
 banks in repair in all time coming, &c. that matter
 not being submitted to the arbiter, but disposed of
 by the agreement of the parties. 4th, That the ar-
 biter had decided in his own favour a matter in
 which he had an interest, his own lands being
 benefited by the operations, the whole expense of
 which he laid on the parties to the submission, and
 chiefly on the Appellant. 5th, That there was
 strong reason to believe that he was actuated by a
 corrupt motive arising from some transaction or un-
 derstanding between himself and Cheape. 6th, That
 the arbiter acted with partiality, having refused to
 give the Appellant for perusal a draft of the decree

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July 8, 1817.

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TION.

before it was pronounced, and to receive evidence offered by the Appellant to show that his proportion of the expense ought to be but small, though the Appellant submitted to him full observations in writing containing a statement of facts leading to that conclusion.

Defences.

The defences were—to the second reason, that the Appellant having signed the submission it was *jus tertii* on his part to state this as a reason of reduction. 3d, That it was by no means clear that the powers of the arbiter were not sufficiently ample for the purpose; but if not, though the clause should be held *pro non scripto*, the award would be good as to the rest. 4th, That this reason was well known to the Appellant before he signed the submission. 5th, That the character of the arbiter was an answer to this reason, and that Cheape pointedly denied any such understanding or transaction. 6th, The arbiter heard all the facts condescended upon, but did not think them of such a nature as to alter his judgment, founded on his own knowledge of the subject, and the opinions of other persons of skill, of whose assistance he availed himself.

Judgment
below. July
8, 9, 1814.

The Lord Ordinary repelled the reasons of reduction, sustained the defences, &c. and decerned, and to this judgment the Court unanimously adhered; and Johnston appealed.

For the Appellant it was contended, 1st, that the award was null and void, because the term of the submission had expired before it was pronounced; and the present case was distinguishable from that of *Taylor v. Grieve*, Fac. Coll. 25th Nov, 1800,

"jured by neglecting such repairs, otherwise the
 "person or persons failing so to do shall, over and
 "above performance, pay whatever damage any of
 "the others shall happen to sustain thereby, as the
 "same shall be ascertained by fit neutral men."

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TION.

The submission was signed by the Appellant on the 11th, and by the Respondents, Cheape and Buist, on the 14th March, 1811. The arbiter immediately began and proceeded with the work, and prorogued on the 8th November, 1811, and 2d November, 1812. The Respondents Heriot and Wemyss signed the submission, the one on 20th March, the other on 9th April, 1813. The work being completed in May, 1813, the arbiter then made his award, which, after reciting the submission, prorogations, and execution of the works, proceeded in these terms: "And being well satisfied
 "with the manner in which these operations have
 "been executed, and that the object which the
 "parties to the submission had in view, will be
 "completely answered, and having caused measurements of the work executed to be made and as-
 "certained, the whole expences of the operations
 "including interest up to the term of Whitsunday,
 "1813, as per a particular state thereof, signed by
 "me of this date as relative hereto, to amount to
 "the sum of 759*l.* sterling; and having frequently
 "gone over and inspected the grounds belonging to
 "or possessed by the said parties, which have been
 "or may be benefited by the said operations;
 "having heard the parties as to their claims, having
 "got all the information which I consider necessary
 "for determining the matters submitted to me, and

Dates of the
signatures.

Award.

June 9, 11,
July 8, 1817.

ARBITRA-
TION.

Excess.

“ having maturely deliberated upon every circum-
 “ stance relating thereto, and being now well and
 “ ripely advised therein, and having God and a good
 “ conscience before my eyes, do give and pronounce
 “ my final sentence and decreet arbitral as follows,
 “ viz. I find and hereby decern and ordain that the
 “ above-mentioned sum of 750*l.* sterling shall be
 “ paid proportionally as follows by the respective
 “ parties, being the ratio in which I am of opinion
 “ and hereby find that the lands belonging to or
 “ possessed by each of them, have already been or
 “ may be still benefited in consequence of the
 “ operations above-mentioned ; viz. The said Wil-
 “ liam Johnston shall pay the sum of 535*l.* sterling,
 “ the said John Cheape shall pay the sum of 146*l.*
 “ sterling, the said James Balfour Wemyss shall
 “ pay the sum of 43*l.* sterling, the said Henry Buist
 “ shall pay the sum of 22*l.* sterling, and the said
 “ James Heriot shall pay the sum of 13*l.* sterling;
 “ and each of the said parties shall farther pay the
 “ legal interest of the sums above-mentioned, to be
 “ paid by them respectively from and after the said
 “ term of Whitsunday, 1813, till they are paid;
 “ and I hereby also decern and ordain the said par-
 “ ties, or such of them as have lands in property
 “ or possession opposite to the said river, and their
 “ heirs and successors, to keep the river and the
 “ banks thereof now that the said improvements are
 “ completed opposite to the lands belonging to or
 “ possessed by each of them, within the above-men-
 “ tioned points, in good and sufficient condition and
 “ repair, in all time coming, so that none of the
 “ lands belonging to or possessed by any of the

made within a year; and, besides, the Appellant had seen the work going on without stating any such objection at the time; and he could not be allowed to take advantage of it after the work was finished, but must be held to have acquiesced in the validity of the prorogations.

June 9, 11,
July 8, 1817.
ARBITRA-
TION.

Reply. The principle upon which the case of *Sharpe v. Bickerdyke* was decided, was, that it was essential in the nature of arbitration that the arbiter should hear both sides. An arbiter must hear both sides; and in this case the evidence was rejected, not because the arbiter had examined it and thought it of no consequence, but, because his mind was made up without it. The case of *Kirkaldy* did not apply to this question. With respect to the point of interest, an interest more remote than that which would render a person an incompetent witness, was an objection to jurors and arbiters. There was no evidence that the parties, when they signed the submission, knew of the interest arising from the agreement with Cheape; and it must be taken that there was such an agreement.

Mr. Campbell. It is not positively averred that there was any such agreement, and it is denied that there was.

Sir S. Romilly and *Mr. Leach* for the Appellant; *Mr. Warren* and *Mr. Campbell* for the Respondents.

Lord Eldon. (C.) The reference in the first of Judgment.

July 8, 1817.

ARBITRA-
TION.

1st Cause.

Obligation
and submis-
sion by the
parties.

these causes was in these terms:—"We, John
"Cheape, Esquire, of Rossie, and William John-
"stone, Esquire, of Lathrisk, considering that our
"respective properties *have been* much improved
"by the deepening of the drain from the Loch of
"Rossie, and that it would be still more advan-
"tageous to us to obtain a further level, which we
"will be able to do, when the proposed alterations
"upon the river Eden, between the bridge over the
"same near the village of Kettle, and where the
"said drain falls into the Eden, are completed.
"Therefore we bind and oblige ourselves, our heirs,
"and successors, to bring up the said level, or such
"proportion of it as we, or either of us, shall think
"requisite, as soon as it can be accomplished, from
"the said point where the Rossie Drain falls into
"the Eden, up to the march between our respective
"properties at Bowhouse Moss, and to keep the
"same redd and clear and in good order in all time
"thereafter, at our mutual expense, which shall be
"proportioned according to the benefit accruing
"therefrom to our respective properties; and having
"confidence in Andrew Thomson, Esquire, of
"Kinloch, as being a fit person for determining
"the value which such operations will yield to our
"respective properties, and ascertaining the pro-
"portion of the expense thereof which each of us
"shall pay. Therefore we do hereby nominate and
"appoint the said Andrew Thomson sole arbiter
"between us, to decide and determine what pro-
"portion each of us shall pay of the expense of
"the operations *already executed* upon the Rossie
"Drain, from the point where it falls into the Eden

“ up to the march between our properties at Bow-
 “ house Moss, and of *what is to be* hereafter done
 “ when the improvements upon the channel of the
 “ Eden are finished ; and also in keeping redd and
 “ clear and in good condition the said drain be-
 “ tween the foresaid points in all time coming, ac-
 “ cording to the benefit which he shall think our
 “ respective properties have derived and will obtain
 “ from such operations, with power to the said
 “ arbiter to take all manner of probation, and to
 “ direct measurements and valuations to be made,
 “ and to do every thing else necessary, or that he
 “ shall think proper, for enabling him to decide
 “ and determine in the matters hereby submitted
 “ and referred to him, and whatever the said arbiter
 “ shall decide by decret arbitral to be pronounced
 “ by him betwixt and the day of or
 “ between and any future day to which this sub-
 “ mission may be prorogated, and which he is
 “ hereby empowered to do at pleasure, we hereby
 “ bind and oblige ourselves and our foresaids to ac-
 “ quiesce in, impliment, and perform, under the
 “ penalty of 100*l.* sterling,” &c.

July 8, 1817.

ARBITRA-
TION.

That was the power which the arbiter was to
 have ; and what use he should make of it was left
 very much to his own discretion, at least so it would
 be construed in this country. This gentleman made
 his award, and ordained “ that of the above-men-
 “ tioned sum of 2105*l.* 2*s.* the said John Cheape
 “ shall pay 1335*l.* 2*s.* and the said William John-
 “ stone shall pay 770*l.* being the ratio in which I
 “ hereby find their respective properties to be be-
 “ nefited by the operations on the drain, and as

July 8, 1817.

ARBITRA-
TION.

Award.

“ the whole of the said sum of 2105*l.* 2*s.* has been
“ advanced by the said John Cheape, I hereby
“ decern and ordain the said William Johnstone to
“ make payment to him of the said 770*l.* with the
“ legal interest thereof, from the respective periods
“ when the advances were made till paid. And I
“ hereby farther decern and ordain the said parties
“ and their heirs and successors to pay for any
“ future operations on said drain, and in keeping
“ the same redd, clear, and in good condition be-
“ tween the foresaid points in the proportions above-
“ mentioned; and I also decern and ordain the said
“ parties and their foresaids to acquiesce in, impli-
“ ment, and perform this decreet arbitral in all
“ respects, to each other, under the penalty of
“ 100*l.* sterling,” &c.

The Appellant refused to obey the award, and a charge upon the decree having been given, he offered a bill of suspension; and, at the same time, brought an action of reduction (with which the suspension was conjoined) to reduce the submission and decree, alleging:—1. The common reason of style:—2. That the arbiter had decided in his own favour, a matter in which he was interested; for that a considerable number of years ago the arbiter cut a drain from his own lands, passing through Mr. Cheape's property, and falling into the Rossie Drain; so that the arbiter had burdened the Appellant with the expense of an outlet for his (the arbiter's) own drain. As to that second reason—and the second and third reasons are, as to this point, much the same—I see no ground for insisting upon that as any objection. The parties knew whom the

Objections of
interest and
corruption
unfounded.

arbiter was, and he was chosen on account of his own skill in such matters ; and I see nothing in the proceedings to show that he acted corruptly or even improperly. At the same time, there can be no doubt that, even in the law of Scotland, which attaches so much value to arbitration, the refusal by an arbiter to receive proof, where proof is necessary, may amount to what even they would consider to be a ground for setting aside the award.

July 8, 1817.

ARBITRATION.

But there may be such a refusal to hear evidence by an arbiter as would lay a ground for reducing an award.

In the second cause, which is connected with the first, the submission was in these terms (*vid. ante*).

One question in this case was, whether the arbiter's authority to decide extended beyond the year ; and another question was, whether he had any right to decide that the parties should keep the river and banks opposite their lands, which were to be benefited by the improvements, in good and sufficient condition and repair, in all time coming ; and, although the award, as to this point, followed the terms of the submission, it was insisted that it was *ultra vires*, and that they themselves were to determine what should be done after the work was completed. But it was farther contended, that even if the arbiter had authority to deal with that point, yet he had not done justice to the Appellant, because he ought to have confined that part of the award to such lands of the Appellant as were "*to be thereby benefited*," his authority not extending beyond that : and the Appellant insisted that only some of his lands were benefited, whereas it was on the other hand contended that they were all benefited.

2d Cause.

Johnstone also insisted that as he subscribed the Objection that

July 8, 1817.

ARBITRA-
TION.

the legal time
had expired.

Not sustain-
able, because
the party,
having seen
the operations
going on for a
long time
without inti-
mating any
such objec-
tion, it was
reasonable to
hold that he
had waived it.

submission in 1811, and as the award was not made till May, 1813, the legal time had expired before it was pronounced, and that as to him it was good for nothing; and that the objection was not removed by the prorogations, because they applied only to a supposed submission amongst five parties; and that the submission which he signed was not, at the time of the prorogations, a submission amongst five parties, some of the parties not having signed till after the date of the last prorogation: and a distinction was stated between this and the case of *Taylor v. Grieve*, in as much, as there the last signature was within the year. I have considered this objection, and I agree with the Court of Session in the opinion that it cannot be supported. For when one considers what was to be done, the channel of the river to be deepened, a bridge to be taken down, and another to be built; and that he saw all this going on without making any objection at the time, I think it is reasonable to take it as if he had said that he never meant to make the objection; and to hold that he should not be permitted to make it with effect after the work had been finished.

Corruption.

Then it is insisted that the arbiter acted with a partiality that indicated corruption. That, however, depends on the view which he took of his duty; for an arbiter is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not. The submission bore that Mr. Thomson was chosen arbiter because he himself knew the subject. But he saw all the evidence and all the inferences arising out of the circumstances; and

Arbiter not
bound to re-
ceive evidence
in all cases,
whether it will
have any effect
on his mind
or not.

he seems to have proceeded on this ground, July 8, 1817.
 "taking all these matters to be facts, yet having
 "my own local knowledge to guide me, and all the
 "other circumstances in my view, I cannot adopt
 "your conclusion." So that on all these grounds
 I take the judgment of the Court below to be
 right.

ARBITRA-
TION.

But I have one difficulty in this second case.
 Suppose we should be of opinion that the submission did not authorize the arbiter to decide upon the manner in which the parties were to act with respect to these improvements in future, the question will arise whether that vitiates the whole award. If I were now to give my own opinion, I must say that this part of the award might be held, as they express it, *pro non scripto*, and that the rest would not be affected; and then what I wish is, to be sure that I apply that principle as the Court below would apply it. My own opinion is, that the arbiter has so far gone beyond his powers.

Ultra vires.

The judgment in this second cause was this. After the usual recitals, the Lords find that the arbiter, in so far as he has decerned and ordained that the said parties, or such of them as have lands in property or possession opposite to the said river, &c. should keep the river and banks thereof, &c. in good and sufficient condition and repair, in all time coming, &c. otherwise that the person or persons, failing so to do, should not only perform these stipulations, but also pay whatever damage might be sustained, &c. as the same might be ascertained by fit neutral men, had no authority so

Judgment
read July 10,
1817.

July 10, 1817.

ARBITRA-
TION.

The excess held *pro non scripto*, without vitiating the other parts of the award.

Excess.

Charges ex-
punged as
ultra vires,

without affect-
ing the valid-
ity of the
award in other
respects.

to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decret arbitral; with this finding the cause was remitted to the Court of Session to vary its judgment, so far as the finding might require it to be varied; and the judgment was in other respects AFFIRMED.

In the first cause the Lords found that the arbiter had no authority, according to the terms of the submission, to decern or award that the Appellant should be charged with, or pay the following sums or charges, or any of them, viz. (stating them); but this to be without prejudice to any right of the parties to establish the charges, if they could, against the Appellant in any other mode of proceeding; and, “find that this excess in the decret arbitral ought not to be taken to affect its validity, farther than as it may be necessary to rectify the same with respect to the said excess.” The cause remitted to vary the judgment as far as this finding might require; and in other respects the judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DIXON and others—*Appellants*.

GRAHAM and others—*Respondents*.

March 12, 24; APPEAL from a judgment in declarator in 1810, suffered to June 23, 1817. drop, and action of reduction brought in 1812, to re-

duce the judgment in the declarator; and in 1813 one appeal presented from the judgments in both causes, and the general answer put in. Objected, when the appeal came to be heard in 1817, that it was irregular to join both causes in one appeal; and, besides, that the appeal was irregular as to the declarator, the petition not having been presented within the first fourteen days of the session. The House was of opinion that there was an irregularity in the mode of bringing the causes before it; but:—1. The objection ought to have been made in 1813, when the other parties might have put themselves right in point of form:—2. It ought to have been made by petition, to be referred to the appeal committee:—3. When a cause comes on to be heard, it is to be taken as regular: and, therefore, the appeal heard on the merits, and leave given to the parties afterwards to set themselves right in point of form by presenting another petition of appeal in the declarator *nunc pro tunc*, as if it had been done in 1813.

March 12, 24;
June 23, 1817.

PRACTICE.—
BOUNDARIES.
—NOVITER
REPERTUM.—
PRECEPT OF
SEISIN.

Per Lord Redesdale.—In wastes where there are no fences, the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing. A paper which might, with due diligence, be found at first, is not, in legal meaning, *noviter repertum*. Precept of seisin not to be founded upon in Court, unless it corresponds with the charter.

AN action of declarator having been brought by the proprietors of lands adjoining to Dumbarton Moor, against the Magistrates of Dumbarton, to settle the boundaries of that Moor, to which the Town of Dumbarton derived right by a charter of King James VI.; after proof taken, an interlocutor, dated 16th May, 1810, was pronounced in favour of the pursuers. On 3d July, 1810, the Magistrates reclaimed, but the petition was refused as incompetent, the time within which it was competent

Declarator.

March 12, 24; to reclaim having elapsed. The magistrates then
 June 23, 1817. presented another petition, contending that the

PRACTICE.—
 BOUNDARIES.
 —NOVITER
 REPERTUM.—
 PRECEPT OF
 SEISIN.

Appeal in the
 declarator
 dropped.

Reduction.

Interlocutors,
 Nov. 1819.

judgment was not only erroneous on the proof as it stood, but that it could be established to be wrong, *per instrumenta noviter reperta*, and that it was null and void as being *ultra petita*; upon which last grounds it was maintained that the Court was authorized to open up the judgment. It was stated in the Respondents' case, signed John Clerk and John Jardine, that the Court were fully satisfied that there was no ground for holding the decree to be *ultra petita*; and that the pretended *instrumenta noviter reperta* were of no importance to the merits, and had besides been all along in the possession of the Appellants themselves. From these interlocutors in the declarator, the magistrates appealed in 1810.

The magistrates having, besides the documents relied on in the petition, afterwards discovered in their own charter chest a precept and seisin which they thought material to the case in 1812, raised an action of reduction of the decree, which had been pronounced in the declarator, upon the allegation that there were *instrumenta noviter reperta*, which showed that it was erroneous. And they suffered the appeal from the judgment in the declarator to drop, by not entering into the usual recognizances. The Lord Ordinary, in November, 1812, pronounced an interlocutor in the reduction, finding, "That before the decreet under reduction was extracted, the present pursuers gave in a long petition to the Court, craving, that upon certain alleged informalities in the proceedings, and in

" the decret pronounced by the Court, and also
 " on the ground of their having recovered certain
 " documents, as to which they stated the plea of
 " *noviter veniens ad notitiam*, their Lordships
 " should open up the judgment they had pro-
 " nounced, which was then final, but that this pe-
 " tition was refused by the Court; finds, that in
 " this petition all the objections as to the informal-
 " ity of the proceedings, or of the decree now
 " founded on as reasons for opening up the decree
 " by reductions, were fully stated; and also all the
 " documents on which they now found, except two,
 " viz. the precept and the seisin mentioned in the
 " condescendence, and in regard to the said precept
 " and instrument of seisin, the Ordinary is of opi-
 " nion, that the plea of *noviter veniens ad notitiam*
 " does in no ways apply to them more strongly than
 " to the other writs, as to which it has been repelled
 " by the Court. And on the whole matter, repels
 " the reasons of reduction."

March 12, 24;
June 23, 1817.

PRACTICE.—
BOUNDARIES.
—NOVITER
REPERTUM.—
PRECEPT OF
SEISIN.

To this interlocutor the Court, on the 18th Nov. 1813, adhered.

The magistrates then, in 1813, lodged one appeal
 from the judgments in both causes. The agent for
 the Respondents, though aware that the joining
 the two causes in one appeal would probably be
 considered as an irregularity, yet as the taking
 notice of it immediately, when the matter might be
 amended, would only be attended with the expense
 of an additional case; he thought it most for
 the interest of his clients to put in the general
 answer.

Appeal, 1813,
in both causes.

General an-
swer.

The appeal came on for hearing in the House of
 Lords on the 12th March, 1817, when the preli-

March, 1817.
Objections to

March 12, 24; minary objection was taken by Mr. Leach and Mr.
 June 23, 1817. Adam, the Counsel for the Respondents. 1st, These

PRACTICE.—
 BOUNDARIES.
 —NOVITER
 REPERTUM.—
 PRECEPT OF
 SEISIN.

one appeal in
 both causes.

were in form and substance two distinct causes, having no other connexion than that they related to the same subject of property. But the questions were distinct; that in the first cause being whether the interlocutors were right on the evidence there given; that in the second cause being whether the instruments found in the charter chest were, in the sense of the law of Scotland, *noviter reperta*. 2d, The causes were not only distinct, but they could not stand together; the Appellants contending in the original action that the conclusion was wrong; and admitting in the second action that the conclusion in the original action was right. 3d, By the law of Scotland reduction is competent in cases of erroneous judgment. (Ersk. b. 4. t. 3. s. 3. 8.) Then suppose three actions of reduction brought each for a distinct cause, if the reduction is part of the original cause, then one appeal may include all the reductions, though for distinct matters. 4th, Suppose the time for presenting an appeal in the original cause to have elapsed, to evade the order of the House, nothing more would be necessary than to bring a reduction on any ground, and that being part of the original cause, the whole may be brought before the House by appeal. 5th, There is a special objection also, which is this; by order of the House the petition of appeal must be presented within fourteen days from the commencement of the session, except in cases decided below, sitting the parliament, in which petitions may be presented within twenty days after the judgment. If

In 20 days

the petitions are not presented till the following session, they must be presented within the first

March 12, 24;
June 23, 1817.

fourteen days. In this instance the petition, with respect to the original cause, was not regular, not having been presented within the first fourteen days of the session, although, with respect to the reduction, it was regular, having been presented within twenty days from the time of judgment pronounced sitting the parliament. 6th, Another distinction is, that a declarator is an outer House cause; a reduction an inner House cause, in which the Lord Ordinary need not decide on the merits, but may make great *avisandum* to the Court. We submit, therefore, that there can be no proceeding at all on either of the causes, but at any rate none on the declarator.

PRACTICE.—
BOUNDARIES.
—NOVITER
REPERTUM.—
PRECEPT OF
SEISIN.

from signing
the last inter-
locutor from
Scotland, 14
days after de-
cree from the
Equity Courts
in England
(and Wales),
40 days from
the Equity
Courts in
Ireland.

Lord Eldon, (C.) Although an appeal is withdrawn, I take it that it may be presented again if within the five years. The petition in this instance was presented in 1813, before the expiration of the time for appealing from the judgment in the declarator; and you, instead of calling the attention of the House to the alleged irregularity of joining the two causes in one appeal, at a time when the other parties, if wrong, might have set themselves right in point of form, put in the general answer. The objection cannot at any rate be properly made in this way, but must be taken by petition to be referred to the Appeal Committee; and then, if they are wrong in point of form, they may be allowed to set themselves right, by presenting another petition of appeal *nunc pro tunc*, as if it had been

March 12, 24; done in 1813. You may, therefore, proceed on the merits now, and we may afterwards consider whether they are right in point of form; and if not, give them an opportunity of setting themselves right. I take the rule to be, that when a cause comes to a hearing, it must be considered as regular; and that, if there is in reality an irregularity, it may be rectified by petition, to be referred to the Appeal Committee.

PRACTICE.—
BOUNDARIES.
—NOVITER
REPERTUM.—
PRECEPT OF
SEISIN.

Sir S. Romilly. The appeal in the declarator was suffered to drop, as the Court could not otherwise proceed with the reduction.

Lord Redesdale. I rather think they might, on the ground of *instrumenta noviter reperta*, and the course would have been to have presented a petition to stay the hearing of the appeal till that should be decided.

Irregularity.

The cause was then heard on the merits; and on the 24th March the Lord Chancellor stated that he was of opinion that there was some irregularity in the manner in which the causes had been brought before the House, and leave was given to enter a separate appeal in the declarator *nunc pro tunc*.

Judgment.

June 23, 1817.

Lord Eldon, (C.) I think the Court below was right in the conclusion that certain documents relied upon by the Appellants were not, in the sense of the law, *noviter reperta*. As to the allegation that the judgment in the declarator was *ultra petita*, if I were to give an opinion now, I must say that some injustice has been done to the town of Dumbarton. One part of the march, that from the Burn Crooks

to the White Haughs, is clear, and I propose to remit the cause with findings to the effect which I have stated.

Lord Redesdale. I have looked at the evidence in this case, and bestowed particular attention upon it considered as a question of boundaries.

With respect to the point as to the *instrumenta noviter reperta*, the principal paper is the precept of seisin; and it is clear that if that was in the possession of the party claiming the interest, and might with due diligence have been found by him and produced at first, it can never be used by him on the ground of being *noviter repertum*; and this paper might with due diligence have been found, as it was in the charter chest of the town. But besides that, I have great doubt on another ground whether the paper could be used, because the precept ought to follow the charter; and if it does not it cannot be used, for the Court must go by the charter.

With respect to the question of *ultra petita*, it is clear that the Court has gone beyond the claim in the pleadings, &c.

In these wastes where there are no fences the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing. But in the line drawn by the Court below a different principle is adopted, &c.

Causes REMITTED for review, with findings as above.

June 23, 1817.

PRACTICE.—
BOUNDARIES.
—NOVITER
REPERTUM.—
PRECEPT OF
SEISIN.

A paper which might with due diligence have been found at first, is not, in the sense of the law, *noviter repertum*.

Court cannot proceed on the precept of seisin unless the precept follow the charter.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ARNOT—*Appellant.*STEWART—*Respondent.*

Mar. 17, 1817. A. a merchant in London, having an order in 1810 from B. a merchant in Perth, for goods to be shipped from London for Dundee, sends the goods to the wharf on Saturday 24th Feb. the vessel then taking in goods for Dundee, being the K. (unarmed) which had been substituted by the Shipping Company for the D. (armed), the Company announcing on the 23d and 24th Feb. to all who inquired that the K. and not the D. was to sail on the 25th (Sundays and Thursdays being the regular sailing days). A. dispatches the invoice on 27th Feb. dated on that day, with advice that the goods had been sent by the D. not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March. The K. sails with the goods on the 25th Feb. and is captured on 2d March by a privateer. Action brought by A. against B. for the price of the goods, and held below that he could not recover. The Judgment affirmed above; the Lord Chancellor being of opinion that if B. had insured upon the representation sent him, he could not have recovered from the underwriter. (*Vid.* Fac. Coll. 25th Nov. 1813.)

MISREPRESENTATION.
—INSURANCE.

Order.

THE Respondent ordered from Redfern and Co., London, by their agent the Appellant, ten puncheons of molasses to be shipped from London for Dundee. The order reached London on the 21st Feb. 1810, and Messrs. Redfern and Co. caused the molasses to

be sent to Miller's wharf on Saturday, the 24th Feb. to be shipped for Dundee. The vessel whose regular turn it was to sail on the next day was one called the *Defiance*. But on Friday, the 23d February, the Shipping Company, as appeared from the evidence of the clerk, had resolved to substitute a vessel called the *Kinloch*, and that was the vessel announced on the 23d and 24th, for sailing on the 25th, and which did sail on that day with the goods in question, the 25th being Sunday, a day on which the mail does not go from London. On Tuesday the 27th Feb. the invoice with advice was sent from London, dated on that day, and having at the end these words "To Miller's wharf, for the *Defiance*, " p. Dundee." The notice, instead of reaching the Respondent on the evening of the 27th, as it would have done if it had been dispatched on the 24th, did not reach him till the evening of the 2d March. On the 10th March he sent a letter to Edinburgh, directing his brokers to insure, &c. per *Defiance* from London to Dundee, stating that the invoice was dated the 27th Feb. and that he would not allow more than the usual premium; and received for answer that it could not be done at the usual premium, as the day on which the vessel sailed had not been mentioned. The *Kinloch* was captured on the 2d March by a French privateer.

Mar. 17, 1817.

MISREPRESENTATION.
—INSURANCE.

Feb. 24, goods sent to wharf.

Advice not sent till Feb. 27.

Order for insurance.

Goods captured.

The Respondent having refused to pay for the molasses, the Appellant, as agent for Redfern and Co. brought an action for the price in the Court of Admiralty in Scotland, and obtained judgment for the amount; but the cause having been brought by advocacy before the Court of Session, that

Action for the price.

Mar. 17, 1817. Court ultimately gave judgment against the claim and in favour of the Respondent, and Arnot appealed.

MISREPRESENTATION.
—INSURANCE.

Interlocutor
Jan. 22, 1813,
for the Defendant.

The points chiefly insisted upon for the Appellant were, that his constituents having delivered the goods at the wharf had nothing further to do with the transaction; that the delay in sending the notice had no effect with respect to insurance, since Stewart, although he had notice on the 2d March, did not attempt to insure till the 10th; and that as these vessels often accomplish the voyage in as short a time as the post conveys letters by land, a person intending to insure ought not to wait the arrival of a letter of advice; and that as to the name of the ship, Redfern and Co. were not bound to watch the operations of the Shipping Company, or to warrant that goods entrusted to a shipping company should be conveyed in any particular ship belonging to that company, even although they intimated that it was meant to send the goods by a particular vessel; and that merchants ought to adapt, as they usually did, the form of the insurance to such accidents as the substitution of one ship instead of another, by insuring "per ship or ships;" and the cases of *Heseltine v. Arrol*, Fac. Coll. Jan. 15, 1802—and *Elton v. Porteous*, Fac. Coll. Dec. 13, 1808—were cited.

For the Respondent it was contended that the notice sent to him was not such as to enable him to make a valid insurance, that from the date of the invoice he was led to believe that the goods were sent to the wharf only on Tuesday, the 27th Feb. and that, as Thursdays and Sundays are the days

on which the vessel sails from the wharf; the sea risk had not commenced till Thursday, the 2d March. If that had been the case, there was no improper delay in not insuring till the 10th, as the vessels are not considered as out of time in eight days, though they often perform the voyage sooner; that supposing an insurance had been effected, the Appellant could not have recovered from the underwriter (and it made no difference when a merchant was his own insurer) for two reasons: 1st, Because the representation must have been that the risk did not commence at soonest till the 27th February, whereas it had in fact commenced on the 25th. 2d, Because the representation must have been that the goods were sent by the *Defiance*, an armed vessel, whereas they were in fact sent by the *Kinloch*, an unarmed vessel. That *Redfern and Co.* having specified a particular ship, were answerable that the goods should be sent by that ship, or at least that at the time when the goods were sent to the wharf the ship specified was that in which the Company then intended to ship them: and that if they had inquired on the 24th Feb. they would have learned that it was intended to send the goods, not by the *Defiance*, but by the *Kinloch*; and the case of *Andrew v. Ross*, 6th Dec. 1810, was cited.

Mar. 17, 1817.

MISREPRESENTATION.
—INSURANCE.

Mr. Leach and *Mr. Harrison* for the Appellant; *Sir S. Romilly* and *Mr. Adam* for the Respondent.

Lord Eldon, (C.) Being of opinion that if the Respondent had insured upon this representation

Judgment.
Mar. 17, 1817.

Mar. 17, 1817. he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment.

MISREPRE-
SENTATION.
—INSUR-
ANCE.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHEPPARD—*Appellant*.

WATHERSTON and others—*Respondents*.

March 7, 24,
1817.

GRASS FARM.
—RENT, &c.

CONTRACT for purchase of lands, 100 acres arable, 700 acres pasture; the purchaser's entry to commence at Whitsunday, 1807, and that he is to have right "to the crop and year 1807," and disposition, assigning "the rent for crop and year 1807." The farm at the time of the sale in possession of a tenant at a rent payable one half at Candlemas, the other half at Lammas, in each year. Held that the seller, not the purchaser, was entitled to the rent payable by the tenant at these two terms in 1807. N. B. The purchaser obtained possession of the grass and houses at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground in that year.

ON the 31st Dec. 1806, the Appellant purchased the lands of Kirktonhill from the Respondent, Elizabeth Watherston and her husband for 7000*l*. of which 2000*l*. was to be paid at Whitsunday, 1807, and 5000*l*. in five years thereafter, but bearing interest from Whitsunday, 1807. In the con-

tract of sale it was declared "that the said Robert
 "Sheppard's entry to the said lands is to commence
 "at Whitsunday, 1807, and that he is to have right
 "to the *crop and year* 1807, and in all time there-
 "after."

March 7, 24,
1817.

GRASS FARM.
—RENT, &c.
Contract.

At the date of the agreement the lands, consist-
 ing of 700 acres pasture, and 100 acres arable,
 were in possession of a tenant, the Respondent,
 John Harvey, under a lease from Elizabeth Wa-
 therston and her husband, for nineteen years, com-
 mencing at the term of Whitsunday, 1803, as to
 the houses, yards, and grass, and at the period of
 the separation of the crop of 1803 from the ground
 as to the arable lands, at the yearly rent of 238*l.*
 payable one half at the term of Candlemas (2d
 Feb.), the other half at Lammas (2d August), 1804,
 for the first year's crop, "*or in full of the first*
year's rent, and so forth, yearly and termly
 "thereafter during the currency of this tack." The
 Appellant, on the 15th Jan. 1807, purchased the
 lease from the tenant, who renounced the benefit of
 it "for all the years thereof to run from and after
 "the term of Whitsunday first, in so far as respects
 "the houses, yards, and grass, and after the en-
 "suing crop is separated from the ground in so far
 "as respects the arable lands, and he binds himself,
 "&c. to leave the premises then patent to the said
 "R. S. &c."

Appellant
purchases
lease.

On the 15th May, 1807, the Appellant obtained
 a regular disposition of the lands, containing an as-
 signment "of the rents, mails, and duties of the
 "said lands due and payable for and forth thereof,
 "*for crop and year* 1807."

Disposition.

March 7, 24,
1817.

GRASS FARM.
—RENT, &c.

Possession of
grass at Whit-
sunday, 1807.

Action, 1809.

The Appellant obtained possession of the houses and grass at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground. Harvey paid the rent due from him at Candlemas and Lammas, 1807, to Elizabeth Watherston and her husband. The Appellant insisted that he was entitled to it as the rent for the crop and year 1807; and in 1809 brought his action against Elizabeth Watherston and her husband, and against Harvey, for that rent, offering a deduction for the pasture lands, of which he received possession at Whitsunday, 1807.

The defence for Harvey was that he had been only four years in possession, and had paid four years' rent: and the defences for the other parties were that the Appellant had entered into possession of the farm, which they alleged was chiefly a grass farm, at Whitsunday, 1807, and ought not to be allowed to possess the land and claim the rent over and above; and, 2dly, that as the crop was sown before the term of the Appellant's entry, that crop by universal practice fell to be reaped by the Defenders. And they insisted that, in all cases of grass farms having a Whitsunday entry, *crop* 1807 did not mean the corn crop of that year with the pasturage of the year preceding as its appendage, but the grass crop of that year with the corn crop of the following year as its appendage, and that there was nothing in the contract which excluded the rule of law; and that the division of rents in parts proportional to the profits of the different crops was a thing unknown in the practice of Scotland; and *Campbell v. Campbell*, Kilk. 11th June, 1745—

Kerr v. Turnbull, Elch. 3d July, 1760—and *Elliot v. Elliot*, 28th Nov. 1792—were cited. March 7, 24,
1817.

The Court of Session, by several interlocutors from June, 1810, to 2d July, 1813, decided in favour of the Respondents, and thereupon the Appellant appealed. GRASS FARM.
—RENT, &c.
Interlocutors.

The cause was heard in the House of Lords on the 7th March, 1817, and on 24th March, 1817, the Judgment of the Court below was AFFIRMED, the Lord Chancellor observing that he should have doubted whether the Court below had rightly construed the words “crop and year 1807,” if these words had not acquired the meaning which they put upon them by the usage of Scotland. But as they were better acquainted with the usage in Scotland, it would be hazardous to reverse the judgment. Still considering it, however, as a case of some doubt and difficulty, he did not advise their Lordships to give costs to the former proprietors. Judgment.
Mar. 24, 1817.

Judgment AFFIRMED, with 120*l.* costs to the tenant.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DALGLIESH and others—*Appellants*.DUKE OF ATHOL and others—*Respondents*.

SALMON fishing with stake-nets held to be illegal.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Description of
the stake-net
apparatus.

THE fishings of all the Appellants are situated in that part of the Tay where the sea ebbs and flows.

About thirty years ago, a mode of salmon fishing was introduced upon the shores of the Solway (the Scottish statutes regulating salmon fishing did not apply to the Solway), which, from the nature of the apparatus employed, is termed stake-net fishing. In its most improved form, it is practised in the following manner. In rivers, or friths where the sea ebbs and flows, a row of stakes is driven from high to low water-mark, for the most part obliquing down the river, or forming zigzags in that direction. The stakes are from four to six feet asunder, and are fastened together at the top, the middle, and the bottom, with strong ropes. Over these ropes a net is extended, the upper part of which is usually about the level of the highest flow of the tide. The meshes of the net measure from ten to twelve inches in circumference; that is to say, each side of the parallelogram measures from two and a half to three inches. In this manner a complete barricado is formed, from high to low water-mark, through which no salmon or grilse can penetrate. In this barricado, at convenient distances, openings

are left, which lead into enclosures of several acres in extent, surrounded with netting exactly similar to that which forms the barricado. The openings are from twenty to thirty yards in width; and across the top of them a net is fixed, which rises and falls with the tide; and which, of consequence, acts as a valve to prevent the fish which have entered with the tide from getting out when it ebbs. The enclosures vary in size and shape according to the nature of the ground. At the angles, openings are left which lead into smaller enclosures, provided each with a net valve of the kind already described; and, in this manner, a labyrinth is formed, out of which no fish that enters can extricate itself. The enclosures are termed by the fishermen courts or *yards*; and the barricado which conducts the fish into them is termed the leader. In this manner, it is scarcely possible that a salmon ascending the river between high and low water-mark should not either be detained in the yards, or entangled in the meshes of the leader. It is usual also to take advantage of the natural hollows, or to form artificial excavations behind the leader, where fish descending the river are left at the fall of the tide.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

In 1797 the stake-net mode of fishing was introduced in the Tay at Sea-side, fifteen miles below Perth; but the Earl of Kinnoul and other superior proprietors having in 1799 brought an action of declarator, this mode of fishing, at least in that part of the river, was in 1801 declared to be illegal by judgment of the Court of Session, which was affirmed on appeal by the House of Lords. But the fishings of the Appellants being situate considerably below Sea-side, where the Tay is an arm of the sea,

Sea-side case,
1801.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.
Action, 1804.

Libel of the
summons.

they maintained that the statutable prohibitions did not extend to their fishings; and they continued to fish with stake-nets.

The Respondents as proprietors in the higher part of the river, in 1804, brought an action of declarator against all the proprietors of salmon fisheries along the Frith of Tay, setting forth in the summons:—" That by the common law of this " realm, the proprietors of salmon fisheries are not " at liberty to exercise the same, or to take salmon " otherwise than by net and coble, where the tide " ebbs and flows, or in a way sanctioned by imme- " morial usage; and that by several acts of Parlia- " ment, particularly by an act of the first Parlia- " ment of James I. passed in the year 1424, inti- " tuled, ' Of cruives, yairs, and Saturday's slop; ' " the act of the tenth Parliament of James III. " passed in the year 1477, intituled, " Anent " ' cruives; ' the act of the first Parliament of " James IV. passed in the year 1488, intituled, " ' Anent cruives; ' and the act of the ninth Par- " liament of Queen Mary, passed in the year 1563, " intituled, ' Anent cruives and zairs; ' and other " acts of the Parliament of Scotland, the taking of " salmon in waters where the sea ebbs and flows, " by means of cruives and zairs or yairs, or other " machinery, is prohibited, and all cruives or zairs " so situated, or set upon sand, or schaulds or " shoals, and upon the water sands, are ordained to " be put away: that nevertheless the Right Ho- " nourable George Lord Kinnaird, the Honoura- " ble William Maule of Panmure, Alexander Wed- " derburn, Esq. of Wedderburn, James Morrison, " Esq. of Naughton, William Dalgliesh, Esq. of

“ Scotsraig, — Anderson, Esq. of Balgay, John
 “ Berry, Esq. of Tayfield, and Archibald Campbell
 “ Stewart of St. Ford, Esq. alleging themselves to
 “ be proprietors of the salmon fisheries, and to have
 “ right to fish salmon in the said water of Tay op-
 “ posite to their respective properties in the coun-
 “ ties of Perth, Fife, and Forfar, have, within these
 “ few last years, by themselves, and persons em-
 “ ployed or authorized by them, erected yairs or
 “ stake-nets, or other machinery of the nature of
 “ yairs, upon the sands opposite to their said re-
 “ spective estates in the said counties of Perth,
 “ Fife, and Forfar or Angus, between the high and
 “ low water-mark, and have thereby taken great
 “ quantities of salmon, and destroyed the fry of
 “ such salmon, and other fishes, contrary to law,
 “ and to the great hurt and prejudice of the pur-
 “ suers, and to the injury of them and all the other
 “ proprietors of salmon fisheries in the upper and
 “ higher parts of the said river of Tay; and that
 “ Francis Charteris, Earl of Wemyss, and others,
 “ alleging themselves to be proprietors of, or to
 “ have right to salmon fishings in the said river or
 “ water of Tay, have likewise either erected, or
 “ threaten to erect yairs or stake-nets, or machin-
 “ ery similar to those above complained of, upon
 “ the sands opposite to their respective properties
 “ within the counties aforesaid.” And the summons
 concluded, “ That therefore it ought and should be
 “ found and declared, by decree, &c. that the said
 “ defenders have no right by themselves, or others
 “ employed or authorized by them, to erect or use
 “ the yairs, stake-nets, or machinery aforesaid, or
 “ other machinery of the same nature, for the pur-

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Conclusions of
the action.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

“ pose of catching salmon or other fishes in the said
“ river of Tay ; and the said defenders ought and
“ should be decerned and ordained, by decreet
“ foresaid, to desist and cease from using the said
“ yairs, stake-nets, and other machinery, and to
“ demolish and remove the same, and to pay to the
“ pursuers the sum of 20,000*l.* sterling, in name of
“ damages sustained by them.”

Interlocutor,
March 7,
1812. Stake-
net fishing
illegal.

After a proof allowed and taken as to the alleged diminution of the produce of the upper fisheries, the alleged destruction of salmon fry and injury to the breed of salmon in the river by the stake-nets, and as to the limit between the river and the æstuary of the Tay, and a variety of other proceedings, the Court on the 7th March, 1812, pronounced this judgment: “ The Lords having resumed consider-
“ ation of the state of this process, and advised the
“ same, with the mutual memorials for the parties,
“ writs produced, proofs adduced, and former pro-
“ ceedings, they sustain the title of the pursuers to
“ insist in this action for having such yairs, stake-
“ nets, and other machinery of the same nature,
“ removed, as have been placed within the high-
“ water-mark, for the purpose of catching salmon
“ or other fishes, opposite to lands bounded by the
“ river, frith, or water of Tay, on those sides or
“ parts where such yairs, stake-nets, or other ma-
“ chinery are placed, and as far down as Drumly
“ Sands, without prejudice to the rights of such of
“ the Defenders as have fishings in the sea: repel
“ the defences, and find and declare, that the De-
“ fenders have no right, by themselves, or others
“ employed by them, to erect or use yairs, stake-
“ nets, or other machinery of the same nature, for

“ the purpose of catching salmon or other fishes June 16, 20
 “ within the aforesaid bounds : decern and ordain 1816.
 “ the Defenders to desist and cease from using the SALMON
 “ yairs, stake-nets, and other machinery complained FISHING.—
 “ of, and to demolish and remove the same ; and STAKE-NETS.
 “ prohibit and interdict them from erecting or
 “ using in future the machinery aforesaid, or other
 “ machinery of the same nature, for the purpose
 “ of catching salmon or other fishes within the said
 “ bounds ; and decern accordingly : find the de-
 “ fenders liable in damages and expenses to the
 “ pursuers,” &c. From this judgment the Appel-
 lants appealed.

With respect to the facts which were the subject
 of proof, the Appellants contended that they had
 made out their assertions that the stake-nets were
 prejudicial neither to the breed of salmon in the
 river, nor to the produce of the upper fishings,
 while the Respondents contended that the evi-
 dence proved the contrary. But the Respond-
 ents further contended that, although all these facts
 were conceded to the Appellants, the stake-net
 mode of fishing was, notwithstanding, illegal, and
 that the Respondents were entitled to prevent it.

In combating this latter proposition the Appel-
 lants insisted upon the following points: 1st, Though
 various statutes prohibit cruives, zairs, and all ma-
 chinery, “ in salt waters, where the sea ebbs and
 “ flows,—in rivers that have course to the sea,” and
 “ within flood mark of the sea ;” and though
 “ they are prohibited to be set on sands and shoals
 “ far within the water,” and, in general, “ upon
 “ the water sands ;” yet the prohibitions do not
 extend to the stake-net apparatus, on account of its

June 16, 20,
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peculiar construction. The legislature had two objects in view ; namely, to prevent the destruction of red and black fish, or fish immediately before and after depositing their spawn ; and to secure the safe passage of the fry to the ocean. But as the stake-nets are always removed during the breeding or forbidden season, they cannot destroy red or black fish ; and as they are wrought on a mesh of three and a half or four inches in diameter, they cannot intercept the fry. As the construction is without the purview, so it is also without the letter of the statutes ; for stake-nets confessedly bear no resemblance to cruives ; they are essentially different from yairs, which are close dykes or pallisadoes, affording no passage to the fry, and they do not answer the description of any other prohibited engine.

2d, The situation, as well as the construction of the stake-nets, exempts them from the operation of the statutes, which, in so far as they contain an absolute prohibition of cruives and yairs, apply neither to rivers unaffected by the tide nor to the sea, but only to the intermediate space where the salt water meets the fresh, and where the fry in their way to the sea stop until they are habituated to the new element. But this point is far above the highest of the Defenders' stake-nets, which are erected on the shore of the sea, where salmon fry are never to be seen.

3d, All the statutes admitting a construction different from that which they contend for, were either expressly enacted as temporary regulations, or have fallen into desuetude.

Lastly, The Respondents have no title to insist

in an action for enforcing the statutes with regard to salmon fishing, which are regulations of police for the benefit of the public at large, not of private individuals interested in the fishings, and the execution of which, therefore, is entrusted to the public prosecutor alone. Neither have they any interest to enforce these statutes, because the stake-nets do not diminish the produce of the upper fishings, that part of the river being as well stocked with fish at present as it was before the erection. And this action is carried on for no purpose but that of preventing the market from receiving a greater supply of wholesome fish, and thereby injuring the monopoly of the Respondents, a purpose inconsistent with the public interest, &c.

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1816.

SALMON
FISHING.—
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On these points it was contended for the Respondents:—1st, That the preservation of the breed, as a source of national wealth, was not the sole object of the legislature in framing the laws for regulating salmon fishing; but that the private interest of individual proprietors was also contemplated; and they referred to the regulations of the mid-stream and Saturday's slap, and entered into a particular examination of the purview and enactments of the statutes. The stake-nets were yairs of the most destructive kind; but, even if they were not, the argument for the Appellants would not be improved, because the statutes applied to every species of fixed machinery.

2d, The prohibition was directed against machinery in *waters* where the sea ebbs and flows, and *flumen* or *fluvius* in Latin, *aqua* in low Latin, a *river* in English, and a *water* in old English and

JUNE 16, 20,
1816.

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FISHING.—
STAKE-NETS.

Scotch, do not exclusively denote a fresh water stream, but apply to every stream, from its source, to where it falls into the main ocean, *mare altum*, including the whole æstuary, *intra fauces terræ*; and in support of this position the Respondents referred to many authorities in the English statute book, Hale *De Jure Maris*, &c.; and in Scottish authors from Jac. 1. of Scotland, to the end of the 17th century; in the Scottish statute books, and in Scottish charters; and the cases of *Leslie v. Ayton*, Dict. vol. 2. p. 359—and of *Gairlies v. Torhouse*—were cited.

Ersk. b. 2.
t. 6. s. 15.

3dly, The leading prohibition against cruives and yairs in waters where the sea ebbs and flows was clearly in force, and was so stated by Stair, Bankton, and Erskine. The statutes in general were admitted to be in force, and the statute, 1469, cap. 38. although temporary at first, and that of 1563, cap. 68., to which statutes the plea of desuetude had been applied, were continued by the general re-enacting statutes, or referred to in subsequent statutes, as existing acts. And the cases of *Fraser v. Duke of Gordon*, Sel. Dec. p. 316—*Gween v. Lady Innis*, and *Prior of Pluscardine v. Laird of Innis*, Balf. Prac. p. 545—*Heritors of Don*, 1693—*Colhoun v. Duke of Montrose*, 1793, 1804—*Queensberry (Duke of) v. Marquis of Anandale*, 1771—were cited.

4thly, With respect to the allegation that the Respondents had no title to insist in the action, the analogies of law, the practice in actions on the fishing statutes, and several express decisions, proved the contrary.

The following note of what the Lord Chancellor said was taken by one of the Counsel who argued the case in Dom. Proc.

June 16, 20,
1816.

Lord Eldon (C.) He thought the judgment was right, but that it would be necessary to make one alteration in it.

SALMON
FISHING.—
STAKE-NETS.

Judgment,
June 16, 1816.

He was of opinion that these stake-nets fall within the meaning of the word yairs used in the statutes; he thought likewise there were other words in these statutes which would comprehend them, *as nets*, within the prohibitions enacted.

Salmon fish-
ing with
stake-nets il-
legal.

The judgment, therefore, was right, except that in one passage it was worded with some degree of obscurity, which it was necessary to remove. The passage is this, viz. "without prejudice to the rights of such of the Defenders as have fishings in the sea." These words in their natural import would mean that the judgment was not to apply at all to such of the Defenders as have fishings in the sea, which is certainly very different from what the Court intended. What the Court meant was, that the judgment did not apply to the sea fishings of any of the Defenders.

He did not see the use of having these words in the judgment at all; for the summons has no reference to any fishings in the sea, but is limited to those in the river and water of Tay.

It had been stated that there was a petition in Court praying that the judgment might be extended as far as the bar of the river; and he had that petition in his hand. He thought that to shut out the inquiry which that petition prays would be wrong: and the more so, because he had himself come to an opinion that the water of Tay, within

June 16, 1816. the meaning of these statutes, does extend farther than the Drumly Sands, and down to the bar.

SALMON
FISHING.—
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The Order of the House was as follows :—

June 20, 1816. “ Ordered and adjudged that the interlocutor
“ complained of be varied by inserting after the
“ words ‘ as far down as ’ the words ‘ the east end
“ ‘ of ’ and by leaving out after the word ‘ sands ’
“ the words ‘ without prejudice to the rights of such
“ ‘ of the Defenders as have fishings in the sea.’
“ And the Lords find that the river Frith, or
“ water of Tay, extends at least as far down as
“ the east end of Drumly Sands; and it is declared
“ that no judgment ought to be given with respect
“ to any rights of fishing claimed in the sea: and
“ it is declared that this judgment is to be without
“ prejudice to any application, made, or to be made
“ to the Court of Session, for the purpose of as-
“ certaining whether the river water or frith of
“ Tay doth not extend farther to the eastward than
“ Drumly Sands; and in case the Court shall find
“ that such river, water, or frith, doth so extend,
“ nothing in this judgment contained is to prevent
“ the Court from making any such order as may be
“ just and according to law, touching or relating
“ to any yairs, stake-nets, and other machinery of
“ the same nature, within the high water mark
“ placed for the purpose of catching salmon or
“ other fishes opposite to any lands to the east of
“ Drumly Sands which shall be found to be
“ bounded by the said river, frith, or water of Tay:
“ and it is further ordered and adjudged that with
“ these variations and declarations the said interlo-
“ cutor complained of be—AFFIRMED.”

SCOTLAND.

APPEALS FROM THE FIRST AND SECOND DIVISIONS
OF THE COURT OF SESSION.MONTGOMERY and others—*Appellants*.CHARTERIS (Earl of Wemyss)—*Respondent*.

AND

DUKE OF BUCCLEUCH—*Appellant*.MONTGOMERY and others, &c.—*Respondents*.

WHETHER a fifty-seven years' lease is struck at by the prohibition to alienate in an entail? Whether the taking of grassum is struck at by the prohibition to alienate, and the proviso against diminution of the rental? Whether there may be a fraud on an entail, distinct from what is prohibited? Whether a lease for thirty-one years; or, in case that should not be good, for the longest of certain alternate periods from twenty-nine to nineteen years, for which the granter should be found by the Court of Session, or House of Lords, to have power to make a lease, may be a good lease for the restricted periods of twenty-one or nineteen years, notwithstanding the indefinite *ish*? &c. &c.

Feb. 8, 5, 7,
10, 13, 14, 17,
18, 21; July
9, 1817.

QUEENS-
BERRY
LEASES.

IN the Neidpath, or March entail, there is, among other prohibitions, a prohibition to *alienate*: and, with respect to leases, there is a clause that it shall be lawful and competent to the heirs of *tailzie*, to set tacks during their own life-times, or the life-times of the receivers thereof, the same being set without evident diminution of the rental. In the Queensberry entail there is a proviso, that the

Feb. 3, 5, 7,
10, 13, 14, 17,
18, 21; July
9, 1817.

QUEENS-
BERRY
LEASES.

heirs shall not set tacks nor rentals for any longer space than the settler's life-time, or for nineteen years, and that without diminution of the rental, at the least for the just avail at the time.

The late Duke of Queensberry had, some years before his death, granted several leases of farms forming part of the Neidpath, or March, and the Queensberry, entailed estates, at low rents (not less, nominally, than the rents at which the lands had been previously let), and taking large grassums. The Earl of Wemyss was the next substitute heir, entitled to succeed to the Neidpath or March estate; and the Duke of Buccleuch the next heir, entitled to succeed to the Queensberry estate. Actions were brought by the Duke himself, by his trustees after his death, by the heirs of entail, and by several of the tenants; the object of all of which was to have the judgment of the Court upon the question, whether the leases, or any, and which of them, were or was valid. With this view, certain particular cases were selected for litigation and discussion, in each of which the principles of decision, it was expected, would govern and decide a class of cases. It had been before decided by the Court below, and the House of Lords, in the Wakefield case (*vid. ante* vol. ii.), that a ninety-seven years' lease was bad as being an alienation.

Wakefield
case. 2 vol.
p. 90.
1st Division of
the Court.
Neidpath or
March entail.
Case of Ha-
restances.

With respect to the Neidpath or March estate, the first case, that of Easter Harestanes, was a case of a fifty-seven years' lease, at 74*l.* rent, and 310*l.* grassum. This was, by the Court below, held bad, on account of the long duration, which brought it within the prohibition to alienate.

The second case, the case of Whiteside, was that of a life rent lease (permitted by the entail), taken without grassum, upon the surrender of a fifty-seven years' lease, with a considerable grassum, the rent remaining the same as before. With reference to this and the next class of cases it is to be observed that there were contracts between the Duke and the tenants, thus surrendering their leases, by which the Duke bound himself to give them longer leases for grassums, if it should be found that he had the power.

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The next case (or class), the case of *Edstoun*, was that of a thirty-one years' lease; or, in case that should be found beyond the power, then it was to be a lease alternately for twenty-nine, twenty-seven, twenty-five, twenty-one, or nineteen, years—"whichever of the said several terms of years short of thirty-one years, the Court of Session, or House of Lords, should find to be the longest period of those above specified, for which the Duke had power to grant a valid lease." This lease also was granted without grassum upon the surrender of a fifty-seven years' with grassum, the rent remaining the same as that under the fifty-seven years' lease.

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stoun.

These Whiteside and Edstoun leases were held by the Court below to be bad, on account of the grassum taken on the fifty-seven years' leases, for which they were substitutes, grassum being a diminution of the rental and an alienation of the profits; and they were held bad also on the ground of fraud on the entail, in which the tenants, as appeared by the contracts, were implicated. The

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Court below appears not to have considered the above indefinite kind of *ish* as any objection to the validity of a lease for the restricted periods of twenty-one or nineteen years. From these decisions the trustees of the late Duke appealed.

The late Duke of Queensberry also granted several leases of farms on the Queensberry estate for nineteen years, taking large grassums. These leases were divided into four classes:—1st, Leases granted to the tenants in those tacks which were current, or to strangers, under the burthen of the current tacks; and with obligations in both cases to grant a new lease for nineteen years, annually, during the Duke's life:—2d, Leases granted under a similar obligation to renew, where the current leases had expired:—3d, Leases granted without an obligation to renew, but where the current leases were not near their natural expiration:—4th, Leases without obligation to renew, and not granted till the previous leases had expired. Upon a declaration by the trustees of the late Duke of Queensberry before the second division of the Court, all these leases were sustained, the second division of the Court considering grassum as no objection. From that decision the Duke of Buccleuch appealed.

The cases of some of the tenants were brought separately, both before the Court below, and the House of Lords; but the above general statement will, it is apprehended, be sufficient in this place. A more detailed statement of the cases, and proceedings, and of the material clauses in the entails, will be found in the Lord Chancellor's speech. It

is not deemed expedient in the actual state of the proceedings to go at all into the argument at present.

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Mr. Leach and *Mr. Jeffray* for the Heirs of Entail; *Sir S. Romilly* and *Mr. Cranstoun* for the Trustees; *Mr. Moncrief* for the Tenants.

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Lord Eldon (C.) Your Lordships' attention has been called, in the discussion of the various cases which are in controversy between the Heir of Entail, the present Lord Wemyss, and the executors and disponees in trust of the late Duke of Queensberry, and the several tenants, either by particular action or otherwise, who may be represented as having interests in the questions under your Lordships' consideration, to the decision of cases which may, I think, be represented as cases of considerable difficulty; but I am sure they may be represented as cases of importance, at least, altogether unexampled by any that have fallen within my observation in the course of my professional life.

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My Lords, When I so state the points to your Lordships which are now under consideration, I am impressed undoubtedly with the notion that this House never had a more important duty to discharge than it is called upon now to discharge. The consequences of your Lordships' decisions upon these causes, to the parties immediately interested, are very weighty and very important. The parties interested have now at stake a property of very great value; but it is not only with reference to the value of the interest your Lordships are to decide,

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when you think it proper to come to a decision upon these causes ; but your Lordships are now to establish principles of decision, which must in a great measure settle the law of Scotland, as far as it has hitherto been considered as unsettled, in respect of entails ; and if, on the one hand, your Lordships feel any degree, if I may so express myself, of judicial uneasiness in disappointing the dispositions made by the late Duke of Queensberry, you have, on the other, to recollect that your decision must affect the powers and interest of every owner of an entailed estate in Scotland, where his powers and interests are not defined in express terms, and that if you can establish the acts, which are now complained of as done in prejudice of the entail by the late Duke of Queensberry, you may probably be thought to establish principles that may open to the destruction of most of the entails in Scotland, not only affecting patrimonial interests, but, if we were at liberty so to view any cases which come before us in judgment, affecting very much the political state of the country. But I put that out of the question.

My Lords, We are bound, unless I misunderstand this case, whenever we come to the decision of it, to determine what opinions we ought judicially to adopt among those, various as they appear to me to be, which are stated by the lawyers, and delivered by the judges. The present case has this circumstance belonging to it, all the present cases, I should say, have this circumstance belonging to them, that your Lordships have to determine, whether the first division of the Court of Session,

which has held most of the acts of the late Duke of Queensberry, the subjects of consideration before your Lordships, to be utterly null and void; or the second division of the Court of Session, which has, as it appears to me, in substance and effect, held those acts to have perfect legal validity, is right.

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My Lords, There are two deeds of entail, under which the Queensberry family claim: The one has been distinguished, I think, in the course of the discussions at the bar, by the name of the March or Neidpath entail; and, upon the construction of that entail, questions arise in several different cases. The first of those cases is that of the Duke of Queensberry's executors, together with a Mr. Alexander Welsh, who is a tenant under a lease of a farm called Easter Harestanes; and the questions in that case, are, *first*, Whether the lease granted by the Duke of Queensberry for a term of fifty-seven years is bad, as an alienation prohibited by the entail of that estate? and, *secondly*, Whether the lease is bad on account of a grassum or fine having been taken by the lessor?

My Lords, In the consideration of this case, the Court below, that is, the First Division of the Court of Session, have thought that it was not necessary to give much of attention to the second of those questions, namely, whether the lease was bad on account of a grassum or fine having been taken by the lessor, that Court being of opinion, that a lease for fifty-seven years, if granted without a grassum, was to be considered as being an alienation, prohibited by the deed of entail, it being a lease of

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more than ordinary endurance, that it did not operate, as they call it, as location, but in fact amounted to an alienation of the property; and if the Court was right in so holding upon the circumstance of the duration of that lease, it becomes unnecessary to consider, in that particular case, the second question, whether the lease was bad on account of a grassum or fine having been taken by the lessor; and if your Lordships should be of opinion, that that lease having been granted for fifty-seven years, is not a lease which can be considered as being granted according to the powers of the entail, when your Lordships decide upon that case, it will not be necessary to give attention to the circumstance, that a grassum or fine was paid.

My Lords, Since the case was decided, however, as I understand the matter of fact, in the Court of Session in Scotland, an Additional Case, by which I mean an additional printed case, an additional representation upon the subject, has, by your Lordships' leave, been laid upon your table; and that case contends, that, though a lease for ninety-seven years in the case of Wakefield was held by your Lordships some little time ago to be bad as an alienation, yet this lease, being for an inferior term, fifty-seven years, ought not to be considered as an alienation, and more especially as there has been an usage in Scotland of granting leases for fifty-seven years, not only by heirs of entail, but by proprietors of estates held in pure fee; and that therefore that usage, if the principles of administration are to be applied in these questions to the granters of leases of entailed estates, is very mate-

rial to be considered on the question, whether there has been an ordinary and due administration. My Lords, besides that, the additional case argues, that a plea may be maintained for this tenant for fifty-seven years, under the statute of 1449, a statute which, your Lordships will recollect, sustains the interest of a person claiming under a lease, declaring him, as it were, to have a real right in lands as against singular successors, against any persons who took the estate, he paying the like duties as were paid to the grantor of the lease; and it is submitted, that that statute of 1449 would protect this tenant, whatever construction is put upon the deed of entail. My Lords, the additional case also insists, as the original case had done, that there is an essential distinction between a fine or grassum, and rent; that taking a grassum is not diminishing rent; and that therefore if this lease is not bad in point of duration, as the original case insisted, it cannot be considered as invalid, in consequence of the original lessor having taken a fine or grassum.

I have taken the liberty to mention to your Lordships what I consider to have been insisted upon by this additional case, because it will be obvious, that, if the tenant could be protected in this case by the act of 1449, the same protection may be contended for in other cases, and it does not appear to me that that point was insisted upon in the Court below, to the extent of enabling us to determine absolutely and clearly what would have been the judgment of the Court below upon that point. My Lords, I do not hesitate to state to your Lordships, that I entertain an opinion upon it which I will not be con-

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sidered however at present as delivering in judgment, but I apprehend it may be made out, that, although the statute of 1449 has the effect which it is contended in this case that it has, generally speaking, yet, it will be difficult to contend that, if the grantor by an entail has not power to make a lease for fifty-seven years (I am not now saying whether he can or not in this case), the succeeding heir of tailzie can meet with an answer from the lessee of the person who went before him in the enjoyment of the entailed estate, under the act of 1449. The act of 1685 *quoad hoc* must perhaps be taken to be a repeal of the act of 1449, if the lease which is made by the heir of entail is not otherwise a good lease, and does not otherwise give a valid title. I will not farther discuss that at this moment.

My Lords, The next case is the case of the Trustees of the Duke of Queensberry and the Earl of Wemyss, and a person of the name of William Murray, tenant in a farm called Whiteside. My Lords, with respect to this farm called Whiteside, which appears to have been let at a particular period, together with another farm called Fingland, and another called Flemington, I pass over at present, and perhaps not meaning to resume the consideration of some circumstances. I pass over them, because I understand it to be the wish of both parties that such circumstances should be passed over, namely, that Whiteside, Fingland, and Flemington were let together for a gross or cumulo rent of, I forget what sum, I think somewhere between 200*l.* and 300*l.*; and that afterwards these

three farms having before been so let together, were let separately, and then a question might arise, at least a question would have arisen in our law, whether the letting them separately, though the three different rents constituted the same quantum of rent, which was reserved upon the grant of the lease when the three were let together, was a letting at the old rent? and perhaps it would be very difficult, in matter of English law, to say it was so, because there is an essential difference between one rent of the amount of three, and three rents of the amount of one, and the respective rents so constituted. I understood, however, that it was intimated, I think by Mr. Leach, that that should be passed over.

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The objections then in this case are, that there had been a lease granted to the tenant for fifty-seven years, upon which a grassum was received; that that lease for fifty-seven years, upon which a grassum was received, an alarm being taken about the validity of such leases, was in effect renounced, and the present lease taken; but that the present lease, under the circumstances, under which it took effect, was in truth nothing but a substitute for the former lease, and, being a substitute for the former lease, and a grassum having been taken for the former lease, that the latter lease, a substitute for the former, is also to be considered as affected by the same objections, arising out of the fact of payment of a grassum, as would have applied to the first lease. There are likewise intimations given, that this tenant, and that in truth all the tenants, were in conspiracy with the late Duke of Queens-

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berry, to defeat the entail, to commit a fraud upon the entail, a notion which I observe the Judges of the First Division have adopted; and one material consideration with respect to this case I will notice whilst it occurs to me, is, that I think the Judges of the Second Division have not, fully at least, adverted to the case put upon fraud. It is, however, to be considered also, whether the pleadings, such as they are, authorize the Courts to look at the case in that view: whether there are in the pleadings, allegations enough to authorize them so to look at it, whatever may be the real nature of the case, and especially with but few of the tenants before the Court. If the second lease is to be considered as a substitute for the first lease, and, because the first lease was affected by the grassum, the second lease must be considered as affected by the grassum, this case necessarily involves, in that view of it, the duty of considering what is the effect of grassum in a lease of this sort. I mention here, too, because it is also a material circumstance, not only with respect to this lease of Whiteside, but with respect to other leases, that it is insisted further, on the part of the tenant, that, if this lease could be affected, either upon the ground of grassum, or upon any other ground that operated an irritancy, yet that irritancy may be purged; and that introduces a question into this case, which is,—Whether the irritancy, which is admitted might be purged, if purgation of it had been sought during the life of the grantor of the lease, could be purged when the grantor of the lease no longer exists.

My Lords, The next case, which you have had

opened to you, is a case of Lord Wemyss on the one side, and on the other a person of the name of Symington, who is a tenant of a farm called Edstoun. My Lords, this is a lease which was granted by the Duke of Queensberry, in consequence of the doubts entertained as to his leases in general, by reason of the controversy in the Wakefield case. This is a lease by the Duke of Queensberry for thirty-one years (not under the statute of 10th George the Third, which grants the power of leasing, under certain restrictions and limitations, for thirty-one years,) with this proviso, that if the Court of Session or the House of Lords shall think it was *ultra vires* of the Duke of Queensberry to grant for thirty-one years, the lease shall be considered, as being a good lease for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years, or for the longest of those periods for which the Court of Session, or the House of Lords, should think it good. When this lease was granted, the Duke of Queensberry at the same time entered into agreements, or it was fully understood by him and the tenants, that if leases for fifty-seven years could be effectually sustained, they were to have such leases, notwithstanding this transaction. My Lords, the First Division of the Court of Session found, that this lease (I think that was their first interlocutor) might be sustained for nineteen years, and for no longer time; that it was competent to the Duke of Queensberry to make a lease with those alternate periods; and that although it was impossible, at the moment it was executed, to de-

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termine what, in point of endurance, was the bargain between the parties, if the lease was to have an ish to be settled by the Court of Session, or if the parties did not like that, by the House of Lords, yet the Court was of opinion such a lease was a good lease, and they would have been disposed (so they state, I think, in effect, in their interlocutor) to have maintained that lease as a good lease for nineteen years, if it had not been that the tenant had mixed himself with that system of management, which they look upon as *fraud* upon the entail, and that therefore, as they express it in their interlocutor, he had no equity to have a lease for nineteen years. My Lords, upon what particular ground they found that the lease would have been good for nineteen years, I am not able to learn from the papers before us. I take for granted they must have gone, in some measure, upon a notion, that, as upon a species of *præsumpta voluntas*, an heir of entail may make a lease for nineteen years (whether with *grassum* is another question), the Duke of Queensberry could, in this manner, make a lease for nineteen years; and it is the law of Scotland, as I understand it, upon this head of *præsumpta voluntas*, that, a nineteen years' lease being considered (whether tacks of longer endurance can or cannot be said so to be) to be an act of necessary and ordinary administration, necessary for the cultivation of the land, such a lease is good. The Court seems to hold that doctrine somewhat upon the principle, which the courts of law in England applied to leases granted by tenants in tail before the statutes about their leases. The courts in Scot-

land, I understand, held the nineteen years' lease to be good, as of the ordinary endurance, upon the grounds of good policy and husband-like management of the estate: the Judges in England held a lease made by a tenant in tail for a term that endured beyond his life to be not *ipso facto* void, but voidable, if the heir of entail chose to have it avoided. My Lords, having in their first interlocutor determined that he had a right to a nineteen years' lease, if it was not affected by that, which they state, as barring the equity to have the nineteen years' lease, they resumed consideration of the matter, and, still abiding by the principle that he had not any equity, they found that he might have been entitled to a twenty-one years' lease; and they state the principle upon which they held that he might have been entitled to a twenty-one years' lease, that it was a lease of a duration according to the custom of the country.

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32 Hen. 8.
cap. 28.

The question, therefore, my Lords, in that case, will be, whether, attending to all the circumstances that had taken place between the Duke and the tenant of Edstoun, prior to the grant of the twenty-one years' lease, and attending (if the allegations in the pleadings will permit you to attend) to the circumstances that have taken place between the Duke and the other tenants, so as to bring them all into concert on the head of collusion or fraud, and attending also to the circumstances of the uncertainty of the duration of the lease, until the Court, by its judgment, should give certainty to that which was uncertain, and attending also to the obligation

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which the Duke came under, in case leases of longer duration could be sustained, to grant leases of longer duration, whether this lease ought to be sustained, either for nineteen years, or for twenty-one years, or any term under thirty-one years.

My Lords, the other two cases, which relate to the March or Neidpath estate, are, the cases of Flemington Mill and the leases of Crook. I do not think it necessary to take up your Lordships' time in stating the particular circumstances of those cases. They do not appear to me to be of considerable moment, certainly not of value, though they may be of moment as to value to the persons claiming the interest, considering their situation of life; but they involve likewise the point of grassum, and the question, whether there is or is not a diminution.

Now, my Lords, upon these cases, thus briefly stated to your Lords, I beg leave, with your permission, for the purpose of enabling me to represent to you the ideas of the First Division of the Court of Session, to call your Lordships' attention to the interlocutors that were pronounced by that Court. The first interlocutor pronounced by the Lord Ordinary was to this effect: "The Lord Ordinary having considered the memorials for the parties, and whole cause, repels the reasons of declarator, assoilzies from the conclusions of the libel, and decerns; reserving to the pursuer his recourse, upon the warrandice in his tack, against the Duke of Queensberry and his repre-

“sentatives, in the event if the said tack should be July 9, 1817.
 “set aside as *ultra vires* of the grantor, and regu-
 “lar process brought for that effect”—the opera-
 tion of this interlocutor being to deny to the tenant
 of Harestanes a right to a judgment in his favour in
 his action, and to assoilzie Lord Wemyss from that
 action of declarator; reserving to the tenant the be-
 nefit of the warrandice against the assets of the late
 Duke of Queensberry and his representatives, in case
 the tack should be set aside as *ultra vires* of the
 grantor, in a regular process brought for that effect.
 They were of opinion that this tack could not be
 maintained against Lord Wemyss, and therefore
 they dismissed that action of declarator; but there
 must be, as I understand, an action of reduction
 to get rid of the tack itself, and if, in the action
 of reduction of the tack, the pursuer should suc-
 ceed, then would arise the benefit of that part of
 the interlocutor to the tenant, by which his recourse
 upon the Duke of Queensberry and his represen-
 tatives is reserved.

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This came, my Lords, in different forms before the whole Court; and they likewise sustained the defences in the process of declarator at the instance of Alexander Welsh against the Earl of Wemyss and others, substitutes under the deed of entail, and assoilzied the said defenders from the conclusions of the libel, and then remitted to the Lord Ordinary in the usual manner.

My Lords, Here it is necessary for me to mention, that the Earl of Wemyss had brought an action of declarator against the late Duke of Queensberry and the tenants of the estate, that action of

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declarator being levelled against William Duke of Queensberry, a tenant of the name of Anderson, another tenant of the name of Tweeddie, another tenant of the name of John Murray, another tenant of the name of Welsh, another tenant of the name of Hutchison, another tenant of the name of James Murray, and several other tenants, including the tenants of Whiteside, Flemington Mill, Fingland, Wakefield, and Edstoun, all tenants and possessors of the said tailzied lands and estates, stating, that "it ought and should be found and declared, by decree of our said Lords, that it was not competent to, nor is the power of the said William Duke of Queensberry, to set or grant any tacks or leases of any part of the entailed lands and estate before written, to endure for any longer term or period than his own life, or the life-time of the tenants receivers thereof, except in terms of, and under the provisions of the act of 10th Geo. III. for encouraging the improvement of lands in Scotland held under settlements of strict entail; nor to grant any tack of the said lands and estate in consideration of fines or grassums, and thereby diminish the rental." My Lords, I take the liberty to lay some emphasis on these words "and thereby diminish the rental,"—because one of the most considerable questions in this cause is, whether that species of diminution of rental which has taken place here is a diminution of rental within the meaning of these deeds, "And that all such tacks or leases so granted, either for a longer period than prescribed by the said entail (unless they are in the

“ terms of the act of Parliament), or upon pay- July 9, 1817.
 “ ment of grassums by the tenant, are void and
 “ null, and shall be of no force or effect in prejudice
 “ of the pursuer, as heir of the entail aforesaid.”

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The Court of Session having sustained the interlocutor of the Lord Ordinary which assoilzied Lord Wemyss from the action of declarator, it then goes on to say, “ that with respect to the process of declarator at the instance of the Earl of Wemyss against the late Duke of Queensberry and John Anderson, and others, tenants of the tailzied lands and estate of Queensberry and others, the Lords remit the process to the Ordinary, to hear parties on the conclusions of the same as applicable to the cases of the several defenders, and to do therein as he shall see just.”

My Lords, Such being the judgment in the case of Easter Harestones, I have only again to repeat, in one short word, that it appears to me, that the Court have decided that case purely upon the length and duration of the fifty-seven years' term. There can be no doubt however, when you look to the principles upon which the Court have proceeded in the other cases, that if it had been necessary for them to have decided upon the point of grassum, the First Division of the Court would have held that the taking of grassum operates a diminution in the rental, and that a diminution of the rental *thereby*, is a diminution of the rental prohibited under this deed of entail.

My Lords, With respect to the case of Whiteside, they enter more particularly in their interlocutor into the grounds, on which they have held that opinion which I have last stated; and as there is

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some little difference, I think, between the interlocutor of my Lord Ordinary and the interlocutor of the Court, I think it will not be improper to state to your Lordships both these interlocutors. The first interlocutor of the Lord Ordinary bears date the 14th day of June, 1814, and it states, "That having
" advised the condescendence and answers in the
" process of declarator, and also the condescendence
" and answers in the process of reduction, at the in-
" stance of the Earl of Wemyss and March against
" William Murray, and whole processes, conjoins
" this process with the declaratory action between
" the parties depending before the Lord Ordinary,
" in so far as the declarator is applicable to the pre-
" sent case: Finds it stated in the condescendence,
" and not denied in the answers, that the whole
" farms, whereof the leases are now under reduction,
" were formerly let by the late Duke of Queensberry
" for fifty-seven years; and, with an exception
" stated by the defender of the lands of Flemington
" and Crook, under burthen of grassums, the interest
" of which bore a considerable proportion to the
" yearly rent: Finds it admitted in the answers,
" that in or about the year 1807, many of the tenants
" holding leases for fifty-seven years renounced their
" leases, and took new ones for periods equal to the
" terms unexpired of the old ones, but without pay-
" ing any grassums for their new leases; and that
" soon afterwards, the tenants of all the farms as
" to which the present discussion relates, whether
" they had got new leases of the nature above men-
" tioned, or had continued to possess on their fifty-
" seven years' leases, executed renunciations, and ac-

" cepted of the existing leases, for which they paid July 9, 1817.
 " no grassums; as also, that when the tenants re-
 " nounced their former leases, and took the present QUEENS-
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 " ones, contracts were entered into betwixt them and
 " the Duke's commissioner, Mr. Tait, as stated in
 " the condescence: Finds, That although it be
 " stated by the respondent, that, depending on a
 " contingency not explained, but said not to have
 " existed, these contracts never were acted upon, yet
 " they afford evidence to show, that the new leases
 " were, with the exception of the term of endurance,
 " a *surrogatum* or substitute for those which had
 " been renounced: Finds, That the rents payable
 " under these renounced leases must, of necessity,
 " have been, from the inconvenience and loss arising
 " to the tenants from the advance of money, a con-
 " sideration of the doubts of the powers of the lessor,
 " held out in the contracts and other circumstances,
 " have suffered a greater reduction than the amount
 " of the interest of the sums paid in the name of
 " grassum: Finds, That the entail founded on by
 " the parties in this cause contains a clause by which
 " it is expressly provided and declared, that not-
 " withstanding of the irritant and resolute clauses
 " above mentioned, it shall be lawful and competent
 " to the heirs of tailzie therein specified, and their
 " foressaids, after the death of the said William Duke
 " of Queensberry, to set tacks of the lands and estate
 " during their own life-times, or the life-times of the
 " receivers thereof, the same being always set with-
 " out evident diminution of the rental: Finds, That
 " the rent payable under the renounced leases, dimi-
 " nished as it was by the payment of grassums,

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“ cannot be considered as constituting a fair rental,
“ such as is implied in the above clause: Finds,
“ That the lease under reduction, though it might
“ be supported by the first part of that clause, as
“ granted for the lifetime of the receiver, is cut down
“ by the concluding part of it, being set with evident
“ diminution of the rental: Repels the defences.”

Your Lordships observe in this interlocutor some of these are findings in a question between the pursuer and this particular tenant, having nevertheless relation, not to the acts merely of this particular tenant, but to the acts of all the tenants who have renewed their leases in like manner; and it concludes with what may be stated as in the judgment of the Lord Ordinary a proposition of law, that the fact being—that the original lease was granted for the life-time of the receiver, and the fact being—that the new lease is to be considered as a substitution for the old one, the new lease is to be affected by the circumstance of a grassum being paid for the old one, and that the grassum so affects both the new and the old lease, as to operate, within the intent and meaning of this deed of entail, such an effect upon the rental, as shall amount to that diminution of the rental which is prohibited by the deed of entail.

My Lords, This came under the review of the Court of Session, and they altered in some measure the finding. They say, “ They find, That the entail
“ in question contains a strict prohibition against
“ alienation; but a permission to grant tacks of the
“ said lands and estate during their own life-times,
“ or the life-times of the receivers thereof, the same
“ being always set without evident diminution of the

Dated 3d,
signed 21st.
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"rental: Find, That in the year 1769, the petitioner's father obtained a tack of Whiteside for nineteen years, at a rent of 109*l.* for which he paid a fine or grassum of 132*l.* 18*s.* 10*d.*" (a grassum very little exceeding a year's rent, which was 109*l.*): "Find, That in the year 1775, the petitioner's father obtained from William Duke of Queensberry a tack of the farm of Fingland for twenty-five years, at the rent of 50*l.* 10*s.* for which he paid a grassum of 480*l.* Find, That in the year 1788, he renounced this lease, of which twelve years were to run, and obtained a new lease, for fifty-seven years, of the said farm of Fingland, and also of the farms of Whiteside and Flemington, at the rent of 266*l.* 16*s.* 4*d.*" This 260*l.* 16*s.* 4*d.* it will be in your Lordships recollection, was the compounded amount of the three rents of Fingland, Flemington, and Whiteside, with the addition of the cess, and rogue and bridge money, amounting to 11*l.* odds, for which he paid a grassum of 400*l.* this grassum being declared to be (not declared upon the face of the lease, but declared in a collateral paper and memorandum) a grassum for Whiteside and Fingland only. And I mention this, because a question arises in another case, that of Flemington, whether it was competent to the Court of Session, or competent to the parties, who were disputing before the Court of Session, to allege that, the grassum, by force of that collateral paper, must be taken to be for two farms, if it did not so appear on the face of the tack. They "find, That in the year 1807 the petitioner's father renounced the said tacks, and took new tacks to himself and sons for their

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“ life-times, at the rents payable under the tacks re-
 “ nounced: Find, That this current tack must be
 “ held merely as a substitute for the former ones,
 “ and subject to any objections, on the ground of
 “ grassum, diminution of rental, or otherwise, which
 “ were competent against the tack renounced: Find,
 “ That in estimating the rents of Whiteside and
 “ Fingland, the value of the fines or grassums paid
 “ at the commencement of the former tacks ought
 “ to have been added to the annual rent: Find,
 “ That this was not done, and that the new rent was
 “ made the same as the old rent, *plus* the cess and
 “ bridge-money: Find, That this was not equal to
 “ the value of the grassums taken, and therefore that
 “ the said last tack of Whiteside and Fingland was
 “ set with evident diminution of the rent, and in
 “ violation of the said clause in the entail: And fur-
 “ ther find, That the conversion of part of the new
 “ rent into a fine or grassum of 400*l.* was to the
 “ manifest prejudice of the succeeding heirs of entail,
 “ and operated as an alienation *pro tanto* of the uses
 “ and profits of the estate; therefore, although the
 “ said tacks in point of endurance do fall within the
 “ permission of the entail above referred to, find that
 “ they are struck at by the clause prohibiting aliena-
 “ tion, as well as by the condition in the said per-
 “ missive clause against evident diminution of the
 “ rent; therefore in the process of declarator repel
 “ the defences, and in the process of reduction repel
 “ the defences, sustain the reasons of reduction, and
 “ reduce, decern, and declare accordingly, so far as
 “ concerns the said tacks of Whiteside and Fing-
 “ land: But in regard no grassum appears to have

“ been taken for the farm of Flemington, and that
 “ by the tack renounced the rent has been raised,
 “ they so far sustain the defences in the process of
 “ declarator.” With respect to this last proposition
 in this interlocutor, they afterwards reverse it, as
 not coming properly before them.

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My Lords, Such being the case with respect to
 Easter Harestanes and Whiteside, as it may be pro-
 per to call your Lordships attention to every cir-
 cumstance in a case of this great importance, the
 finding in the interlocutor with respect to Edstoun
 is in these words: “ The Lords having advised,” and
 so on, “ Find, That a tack of the lands and farm of
 “ Edstoun was granted to the petitioner, to com-
 “ mence at Whitsunday, 1792, for the period of fifty-
 “ seven years, at the rent of 155*l.* 7*s.* for a fine or
 “ grassum of 300*l.*: Find it admitted in the peti-
 “ tion, that doubts having been entertained of the
 “ validity of the above lease, the petitioner, along
 “ with most of the other tenants on the estate,” and
 your Lordships will permit me to repeat these words,
 “ along with most of the other tenants on the estate,”
 that the Court find as a fact, but whether that fact
 is founded on sufficient pleadings and evidence, may
 be a very different consideration, “ along with most
 “ of the other tenants on the estate, renounced the
 “ said tack from and after Whitsunday, 1807, and
 “ obtained a new tack at the same rent for thirty-
 “ one years, or for several alternative periods, down
 “ to nineteen years, according as the Duke should
 “ be found to have powers to grant tacks under the
 “ entail: Find, That this current tack must be
 “ held to be merely a substitute for the former tack;

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“ and subject to any objections, on the ground of
“ grassum or otherwise, which were competent
“ against the tack renounced: Find, That the con-
“ version of any part of the rent which at the time
“ might have been obtained for the farm, into a price
“ instantly paid, was to the manifest prejudice of
“ the succeeding heir of entail, and operated as an
“ alienation *pro tanto* of the uses and profits of the
“ estate, and therefore find that the said tack is
“ struck at by the clause in the entail prohibiting
“ alienations: Find, That in estimating what was
“ the rent paid under the former lease, the value of
“ the grassum paid at the commencement of the
“ former lease ought to have been added, and that
“ this not having been done, the rent payable under
“ the new lease was in evident diminution of the
“ rental: Find, That the whole circumstances under
“ which the tack was granted, taken in connection
“ with the relative contract entered into between the
“ Duke of Queensberry and the petitioner and other
“ tenants, again to prolong the tacks to fifty-seven
“ years, or even to ninety-seven years, if found com-
“ petent, together with the fact, that all the tenants
“ renounced their tacks under similar circumstances
“ and conditions nearly at the same time, do indicate
“ a fixed plan on the part of the Duke to defeat and
“ defraud the entail as far as possible; and that the
“ petitioner and the other tenants did lend them-
“ selves to, and co-operate with the Duke in the said
“ fraudulent scheme: Find, That the tack in ques-
“ tion, and others now before the Court, were not
“ entered into in the fair, rational, and husbandlike
“ administration of the estate, but for the purpose

“ of forestalling the rents and profits thereof, which
 “ would otherwise have belonged to succeeding heirs
 “ of entail, and thereby enriching the Duke at their
 “ expense, by enabling him to draw from the estate
 “ more than the value of his own life-interest in
 “ the fruits of it: Find, That the permissive clause
 “ in the entail, to grant tacks for the life-time of the
 “ grantor or receiver, does not bar the heir in pos-
 “ session from granting tacks for any definite period
 “ which does not amount to alienation, and that the
 “ tack in question might therefore have been re-
 “ stricted to the period of nineteen years, being the
 “ period then and now most usual in the practice
 “ of the country, and analogous to the period” (ac-
 “ cording to the language of this interlocutor) “ fixed
 “ by the statute of the 10th of George III. when no
 “ improvements are stipulated. But in respect that
 “ the tack is otherwise objectionable on the grounds
 “ above specified, and that the tenants on that ac-
 “ count have no claim in equity in support of their
 “ tacks, find, That the said tack cannot be restricted
 “ to any shorter period than that for which it was
 “ originally granted.” Your Lordships therefore
 observe, that in this finding there are adjudications
 of law of very considerable consequence: *first*, That
 the conversion of any part of the rent which at the
 time might have been obtained for the farm, into a
 price instantly paid, operated as an alienation *pro*
tante of the uses and profits of the estate; and the
 question in law about it would be, whether the find-
 ing is just in law, which immediately followed this,
 namely, “ that the said tack is struck at by the
 “ clause in the entail prohibiting alienations;” and

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which, in other words, is a finding, that an estate taken at the old rent with a grassum, is the alienation of the future uses, and is an alienation within the meaning of the words, within the prohibitory, irritant, and resolute clauses in this entail.

Then they proceed to state, that the whole circumstances under which the tack was granted, taken in connection with the relative contract entered into between the Duke of Queensberry, and the petitioner and other tenants, again to prolong the tack to fifty-seven years, or even to ninety-seven years, if found competent, together with the fact, that all the tenants renounced their tacks under similar circumstances and conditions nearly at the same time, do indicate a fixed plan on the part of the Duke to defeat and defraud the entail as far as possible. That introduces a consideration of much moment: We have heard of much difference of opinion as to what is to be the nature of the construction to be put upon the words of an entail,—Whether it is *strictissimi juris*, or to be a sound and reasonable construction; but there appears to have been no difference upon this point, that there may be a fraud upon the entail—at least in the opinions of those eminent lawyers, whose opinions they have stated in the printed cases as authority, which undoubtedly they are not, strictly speaking, but which are of great value to us, as giving us information as to what is considered to be the law of Scotland. In stating their notions as to grassum, they make a saving, if the entail is *defrauded*, reducing it in each case to the question—what is a fraud upon the entail, a question extremely difficult to solve, if an heir of en-

tail, in Scotland may do any thing which he is not prohibited from doing, and he may commit a fraud on the entail by acts which he is not in words prohibited from doing.

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This, my Lords, is a very material part of this interlocutor, as it appears to me with reference to some observations I shall have to make on the Duke of Buccleuch's case. I just refer to it now, because it may enable me to carry your Lordships along with me, when I come to state the proceeding on the part of the Duke of Buccleuch, and these Executors and Disponees in trust. That is a proceeding by the Executors and Disponees in trust, by way of action of declarator in the Court of Session in Scotland, praying to have it found, that all the leases there referred to, which if I count them right, amount to from 290 to 300, all impeached in one action of declarator, are good and valid leases. My Lords (the Court, I suppose, overlooking that circumstance, or perhaps the print before us being inaccurate); it appears that, when they held all those leases to be good, they have in some cases held leases, stated to be for ninety-nine years, to be good. If there can be a fraud upon the entail, as something that is to be contradistinguished from a breach of the prohibition, I should submit to your Lordships, that it may deserve consideration, whether the Executors and Disponces in trust of the Duke of Queensberry, who as such are neither more nor less than his representatives, if he was a party to that fraud, have a right to come into Court with an action of declarator, not making the numerous tenants parties to that suit, but praying to have it declared at their instance,

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that leases granted under such and such circumstances are valid leases. To explain myself upon that: In the Roxburgh case, where we had a grantor of sixteen feus, and a grantee of sixteen feus, we had a case of A. and B. who were alleged to have been acting, if you please so to put it, who might be represented to be acting in fraud of the entail. I do not mean to use the term fraud offensively; and where two parties only to that transaction were represented to be acting in defraud of the entail, it was very difficult to consider one as guilty of that fraud, and the other as not mixed in it; but where the Duke of Queensberry is the party on one side, and between 290 and 300 persons are parties on the other side, if the leases of each are to be impeached on the ground of concert and collusion, it seems fair to contend, *first*, That each tenant, who is to be charged as affected by that concert and collusion, should be charged with it in the form of the pleadings; and, *secondly*, That it should be proved against each in point of fact; and it may possible be extremely clear, I do not say how the fact is, but it may possible be extremely clear, that the Duke of Queensberry, if you can separate breach of prohibition from fraud, and consider breach of prohibition as something different from fraud, that he might be engaged in a transaction which, when the whole circumstances were taken together, might be on his part a fraud upon the entail, but that the tenant A. or the tenant B. might be able to say we took our leases fairly, and in circumstances devoid of all fraud, whatever might be the case of other tenants. I am now looking at the ground of collusion as uncon-

nected with the effect of a grassum being paid on any particular lease; but looking at the case as a transaction in fraud of the entail, the tenants, not proved to be parties to the fraud, may say we are entitled to have our leases sustained, and yet those, who stand only in a situation in which they represent the grantor of those leases, if he was guilty of fraud upon the entail, they having no character but as his representatives, may not be authorized to call upon the Court in an action of declarator, to sustain the leases, whatever rights tenants acting fairly may have.

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My Lords, They have found another fact, "that the tack in question, and others before the Court, were not entered into in the fair, rational, and husbandlike administration of the estate, but for the purpose of forestalling the rents and profits thereof;" finding in this in favour of a principle of law much contested between the parties; they say on the one side, that the heir of entail is the proprietor of the estate, that he is monarch of the estate, to use their expression (I think I shall show your Lordships that he is a limited monarch), and that he is not bound to attend to this thing called the fair, and the rational, and husbandlike administration of the estate, and that nobody can tell what that is; that that principle, if sustained, would furnish a question to be tried in every case; and, on the other hand, it is insisted, that the tenant in tail, though certainly he is not a mere factor, is nevertheless bound to a fair and rational treatment of the estate, giving a reasonable atten-

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tion to the interests of those who are to follow him. I am not now representing my own opinion, but only stating the substance of the controversy. It is contended on the one hand, that this finding cannot possibly be supported; and on the other hand, that it is a proposition which may be well maintained, by looking to what is the true law with respect to entails.

My Lords, This finding also supposes that the period of nineteen years is fixed by the statute of 10th Geo. III.; when I come to call your Lordships' attention to that statute, perhaps your Lordships may not think that it is an accurate assumption with respect to the operation of that statute. Then they go on to state, "that in respect that the tack is otherwise objectionable on the grounds above stated, and that the tenants on that account have no claim in equity in support of their tacks, find that the said tack cannot be restricted to any shorter period than that for which it was originally granted." Your Lordships will observe, that here they not only determine that a lease for nineteen years is good, and that, if granted for thirty-one years, it might stand for nineteen, because it was within the power of the grantor to grant for nineteen years, but they must have taken this as law, that the lease may be good, though having an indefinite undetermined duration till the Court of Session shall say whether it is for thirty-one years, for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years.—My Lords, This seems a

little unnecessary, unless they were to review the finding in the first part of the interlocutor, because, if the first part of the interlocutor could be sustained in law, it did not signify whether the lease was for twenty-one years or for what period it was; but it appears to have been discussed, and that they found that the lease might have been sustained, not for thirty-one years, but for nineteen years, if this equitable ground had not been interposed.

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My Lords, With respect to the two other, the minor cases, I shall not trouble your Lordships with stating the different interlocutors in them. The case in them will be very much the same with respect to grassum; and with respect to the question, whether there is a diminution of rent, they find the facts upon which the cases must be decided, and to which the law must be applied, as you find them stated in the former cases, in a great measure. I would represent, therefore, to your Lordships, that I take the First Division of the Court of Session to have determined that these leases are bad,—that they were *ultra vires* of the Duke,—that there was concert,—that there was collusion between the Duke and the tenants, all the tenants whose leases are not sustained,—and that there was fraud; and that upon all these grounds taken together, or upon some of them severally taken, the tenants were not entitled to have the benefit of their leases. And I presume the Court thought they had, in pleadings and otherwise, before them, sufficient to enable them to form judicially these determinations affecting all.

My Lords, The question in the other case, I mean the case with the Duke of Buccleuch, arises

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on another entail, which we have called, in the course of our discussions, the Queensberry entail. I shall have occasion to state to your Lordships, that there are some differences in the language of the deed of entail with respect to the March and Neidpath estate, and the deed of entail with respect to that estate which we call the Queensberry estate. But I proceed now to state the nature of the proceedings with respect to the Queensberry estate; because I think I am justified in saying, that the decision of the First Division of the Court of Session cannot be right, if the decision of the Second Division of the Court of Session is right; and that the decision of the Second Division of the Court of Session cannot be right, if the decision of the First Division of the Court of Session is right; for, though the deeds of entail are somewhat different in the circumstances, the principles, on which they must be determined, are for the most part the same; one Court, by the application of those principles, thinking itself at liberty to cut down the leases; the other stating, that the true principles, affecting deeds of entail, will not warrant them to hold that such leases are bad. Perhaps I may be allowed to say, and if I am inaccurate it is not for want of attention and of looking into it, that I do not find in the course of the discussions, either of the Bar or the Bench, when the cause was heard before the Second Division, that this question of concert or collusion, and fraud, was much discussed. Whether they forbore to discuss it by reason of finding any difficulty in distinguishing between what is fraud and

what is matter prohibited, or that they thought the nature of the pleadings did not open that view of the case, or for what other reason, I will not say ; but it does not appear to me, that they did very much enter into a consideration of that part of the case, and yet it certainly does appear, not only in the papers we have before us, but in the cases we have had occasion to look into, that lawyers of great eminence, and great judgment too, seem to have thought that there was a distinction between a fair and a fraudulent use of the power in an entail, as distinguished from the doing that, which was prohibited or not prohibited.

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My Lords, The parties seem to have reproached each other in the Court below with respect to the delay. These charges appear to have commenced on the part of the Duke of Buccleuch ; and they likewise intimate, that there has been some degree of management in bringing forward, on the other part, particular tenants with their actions, in the decision of whose cases the titles under the leases might be more favourably attended to, than perhaps in other cases, which might have been selected. But I pass all that by, as not at all assisting us in the decision of that, which we may have now or hereafter to decide upon.

My Lords, The first proceeding which is stated with respect to the Buccleuch business, is the proceeding of the Trustees and Executors of the late Duke of Queensberry ; and it may be important here to call your Lordships' attention to the summons. My Lords, that summons states, " That " the late Duke of Queensberry was proprietor of

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“ all and whole the dukedom of Queensberry and
 “ other places, as nearest and lawful heir of tailzie
 “ and provision to the late Charles Duke of Queens-
 “ berry ;” stating the limitations and restrictions
 and stating the clauses prohibitory, irritant, and
 resolute, of a certain entail or entails: “ That the
 “ said William Duke of Queensberry, during the
 “ time that he possessed the said lands and estate,
 “ did, by himself, or his commissioners, factors, or
 “ others properly authorized by him, grant a great
 “ variety of tacks or leases of the said lands, and
 “ particularly the following ;” And then they pro-
 ceed to state, as I before mentioned to your Lord-
 ships, what, unless I am inaccurate, amount to
 about 298 leases ; and I observe in page 12, of the
 summons I am now reading, that here are leases
 mentioned for 99 years. Then it states, “ That
 “ the said lands and estate now belong to his Grace
 “ Charles William Duke of Buccleuch and Queens-
 “ berry, who has threatened to challenge the leases,
 “ and the possession of the tenants in the lands, in
 “ processes of reduction and declarator, and pro-
 cesses for removing the tenants therefrom ; and
 “ also to bring actions of damages against the pre-
 sent pursuers, as the Executors and Trustees of
 “ the late William Duke of Queensberry, founded
 “ on allegations that the said leases are void and
 “ null, or at all events are granted by the deceased
 “ William Duke of Queensberry without sufficient
 “ powers to grant the same, as having been re-
 stricted by the terms of the entail or entails, and
 “ the investitures under which he held the same:
 “ That in consequence of those threats, the pursuers

“ have also been threatened and molested by the
 “ tenants on the said lands and estate, who have
 “ made large claims against them as Trustees fore-
 “ said, for relief of the claims of the said Charles
 “ William Duke of Buccleuch and Queensberry
 “ against them, and for damages, in the event of his
 “ proceeding in his threatened challenges of the said
 “ leases : That the pursuers, as Executors and Trus-
 “ tees, are bound to recover the whole of the estate
 “ and funds which belonged to his Grace, and to
 “ apply the same to the uses and purposes expressed
 “ in the said trust-deed ; but that, in consequence
 “ of these threats, they are prevented from proceed-
 “ ing in such execution of their duty, and from
 “ winding up the affairs committed to their manage-
 “ ment. And although the pursuers have oft de-
 “ sired and required the said Duke of Buccleuch to
 “ desist from his threats, yet he will by no means
 “ desist therefrom, but refuses, or delays so to do,
 “ and continues to insist therein.” Then it prays,
 that it should be “ found and declared that the late
 “ Duke of Queensberry had full power to grant the
 “ said tacks, and was no ways limited from granting
 “ the same, by any entail or entails or investitures
 “ of the said estate.”

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My Lords, Then it prays, in the nature of an in-
 junction bill. The proceeding therefore is a pro-
 ceeding on the part of the Executors and Trustees
 of the Duke of Queensberry, to have each and every
 of 290 or nearly 300 leases declared to be all valid
 against the heir of tailzie, the tenants, as I under-
 stand, not being parties to these proceedings ; and

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therefore, if the Duke of Buccleuch can be taken in this suit to have joined issue upon any matters, either of fact or of law, which the tenants are interested in sustaining; and, if this judgment had been a judgment in favour of the Duke of Buccleuch upon any matter in fact or law, and had therefore been consequentially adverse to the interests of the tenants, who are no parties to the proceedings, certainly it seems to be a matter of great difficulty, at least to a mind formed in the habits of an English lawyer, to know how that judgment could be applied as against the tenants. On the other hand, it appears to me a proceeding, though not objected to, I observe, a proceeding a little extraordinary in its nature, because, taking it that the tenants are not parties, the Duke of Buccleuch is called upon to set up his defence, I should suppose, as against each of these 290 or 300 leases; and, if there can be a distinction made between the rights of the Executors and Trust-disponees of the late Duke, as representing the late Duke, and as having no interest or title, except such interest or title as the late Duke had; and if there be any foundation for the judgments, which have been pronounced, as I have read them to your Lordships, of the First Division of the Court of Session, that this was concert and fraud upon the entail, it seems a singular thing to say, that all these leases should be sustained, not at the instance of the tenants, or such of them as might have innocently maintained their leases, but at the instance of the Trust-disponees of the Duke, who, if a case of fraud of that nature can be

sustained, must be affected in their titles precisely as ^{July 9, 1817.} the Duke himself would be.

My Lords, In answer to this, the Duke of Buccleuch states this: he admits that he has brought an action of reduction, and then he states the prohibitory and irritant clauses, and so on, and then he proceeds to do that which I apprehend he meant, whether he has sufficiently executed that purpose is another question, but which I apprehend he meant to amount to allegation, not only that this was *ultra vires* of the Duke of Queensberry, but that it was fraudulent on his successor, “ the said “ deceased William Duke of Queensberry succeeded to the estate of Queensberry in the year “ 1778, as an heir of entail, under the foresaid deed “ of tailzie, and made up titles accordingly, under “ the conditions therein contained; but after entering on the possession of the estate, he did not, “ as the leases gradually expired, let the lands at “ the just avail for the time, in terms of the entail;” and, if your Lordships will look at the leases, you will see that great numbers of them were under treaty at the same time, “ but granted “ leases for nineteen years, below the true value, “ and in consideration of large grassums received, “ and after having continued this system for a “ period of eighteen or nineteen years, during “ which time he had consequently drawn a grassum “ for the letting of every farm on the estate, not “ satisfied with the slower mode of again exacting “ grassums as the leases might periodically fall, he, “ from the desire of speedily raising a large sum of “ money to add to his great wealth, and with the

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“ view of defeating the prohibitions contained in
“ the said deed of tailzie, thought fit, about the
“ year 1796, when the whole estate was then under
“ current leases, which had been granted by him-
“ self, to form a device, without waiting for the
“ expiry of these leases, of letting of new the
“ whole estate, both for his own life, and for nine-
“ teen years after his decease, and also in diminu-
“ tion of the rental, contrary to the conditions of
“ the entail, but thereby to obtain immediate pay-
“ ment of large sums of money.” My Lords,
When I come to explain the circumstances, to
which this allegation alludes, your Lordships will
see more distinctly what the operations of the gras-
sums were. If the law allowed them so to operate,
and if the advantage he made of the property was
an advantage he was entitled, by the terms of
the entail, to make of the property, no person can
quarrel with it; but, when I come to state to your
Lordships the circumstances and the transactions of
the Duke of Queensberry with respect to these
leases, and the effect of those transactions, your
Lordships will see, that it is at least incumbent
upon your Lordships to be quite sure that he had
these powers, and that he has executed them in the
manner in which he was authorized to execute them.

My Lords, I wish to state it in the way I am
now doing; for I know it does not become any
man in a judicial situation to look at the conduct of
the parties with reference to any other consideration
than the legal effect of it. Therefore I dismiss all
observation of any other kind. I consider myself
as having this duty imposed upon me, and this

duty only, to consider what is the legal effect of these acts, always attending to this, that, if the law pronounces it to be fraud, it must be so pronounced. In pursuance of that device, it is alleged, his Grace entered into transactions with tenants of different farms on the estate, by which it was agreed, that the latter, upon renouncing the leases, which they then held, and for which they had already paid large sums of money, should, on payment of additional large sums to the Duke, obtain new leases for nineteen years at the same rent as that, which was payable at the period of the said Duke's succession to the estate in the year 1778, or which was stipulated in their said original leases, and without any regard being had to the large sums of money, which had then been paid, his Grace or his factors authorized by him becoming bound, at the same time, to renew the said leases to the said tenants annually during the Duke's life, for the space of nineteen years from the time of his said renewal, without any increase in the amount of the rent being stipulated. Your Lordships will be pleased to give your attention to that circumstance,—that there were grassums taken,—that the grassums were paid on the surrender of many leases, which had not yet expired, upon which leases also grassums had been paid; and that at the time when the leases were made for nineteen years, the author of the entail granted leases, not only for his life-time, or nineteen years, but that the Duke entered into an obligation, that he would grant for a longer period, if it was declared lawful, and that

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he would renew from year to year; and that the question is, Whether the lease existing for the time ought, in point of law and equity, to be considered as a lease for nineteen years? It is stated in argument, that it is settled, that the statute of 1449, as to singular successors,—if no possession has been taken during the life of the grantor, does not protect the tenants, and that therefore this engagement to renew *de anno in annum* left at last only a nineteen years' lease upon the estate; which nineteen years' lease, they contend, the Duke had a right to let at the last moment of his life, provided there was a surrender of the former lease; and that, therefore, this amounts to no more than a surrender of the former lease, and a nineteen years' lease, subject to the question about *grassum*.

Then it states, That these leases were granted in execution of the above-mentioned device of the said late Duke, and all of them are contrary to the provisions of the said entail, and liable to reduction, among other, for all or part of the following reasons. *Primo*, Because they are not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a *grassum* or price payable to the Duke himself. *Secundo*, Because they were granted for a space longer than the setter's life-time, or nineteen years, the obligation of renewal being part of the contract, and elongating the terms of possession for which the lands were let. *Tertio*, Because the leases were not let for the just avail, but for a rent known and intended to be inadequate, and far less

than the avail. The validity of that reason will depend upon the construction your Lordships shall put on the clause in the deed of entail. *Quarto*, Because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases.

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Then, my Lords, with respect to a tenant of the name of Hyslop, the summons, with respect to him, contains nearly, though not exactly in the same words, all this allegation about frauds; and this case so coming before the Court as between the Executors and Trust-disponees of the late Duke of Queensberry and the present Duke, and between the present Duke and one of the tenants, whose lease is mentioned among the 290 noticed in the proceeding of the Executors and Trust-disponees, the Court of Session proceeded to consider these cases and the judgment, which they gave at the instance of the Executors of the Duke of Queensberry, is to this effect. I do not know that it is necessary to trouble your Lordships with the very words of it; but I may state, that the effect of it is to sustain all these leases without exception. My Lords, in the case of Hyslop, he says, that he has nothing to do with the question between the Representatives of the Duke of Queensberry, and the present Duke of Buccleuch; that he is no party to any concert or collusion; that he knows nothing about it; that the only question he has to discuss with the Duke of Buccleuch, is, whether his lease ought to be sustained? and I believe I represent the effect of the

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words of the Second Division of the Court of Session, when I say, that they were of opinion, *first*, That the taking grassum was no objection; *secondly*, That there was no diminution of the rent, in the sense of diminution of the rent, as abstracted from the taking of grassum. They say further, that supposing there had been no such objection as grassum; that, according to the true construction of the clause in the Buccleuch entail, if the Duke let at the old rent, he let without diminution of the rent; that he was not obliged to look out for an increased rent; and that therefore this lease being let for the old rent, and the grassum being no objection, this is a good lease. A question arose also, in the course of the discussion before the Judges of that Court, as to the effect of the word "dispone." Your Lordships will recollect, that in the Wakefield case (and indeed it is some consolation, after what we have heard of that Wakefield case, that I see it admitted in this case, that the Wakefield case was rightly determined, and that the ninety-seven years' lease was, according to the law of Scotland, an alienation), the word "alienate" occurred. In the Buccleuch case, there is no such word as the word "alienate." The prohibition is a prohibition against disposing,—and according to the case of *Stirling of Law against Macdowall* and others, lately decided by the Court of Session, the word "dis-
"pone," it is said, is not of the same effect as the word "alienate;" that though "alienate" would prohibit such leases, "dispone" would not: but how that question would have been settled by the Court, if it had been necessary to determine

the case of Hyslop on that point, and that point only, it does not appear to me that we are informed by the account we have of the judgment; and therefore that judgment also has left us in this situation, that it is a judgment which informs us, that the Judges of the First Division are altogether wrong as to the principle which they apply in construction; that they are altogether wrong in their interpretation of the words "diminution of the rental;" that they are altogether wrong in their notions as to the legal effect of taking grassum; and it leaves us further in this situation, that we have a decision prior to this, in which the Court held, that a prohibition to dispoise was not a prohibition to alienate; and in the present case we do not know what the judgment of the Court would have been, if it had been necessary to determine the effect of the word "dispoise."

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Having stated to your Lordships generally the outline of the case, I will take leave, with your Lordships' permission, to draw your attention to the instruments, the construction of which has given rise to the respective judgments of the Court of Session, premising, in a short word, that your Lordships see the great consequence and the great importance of whatever may be your decision in this cause; it bears upon property included in between 290 and 300 leases in the Buccleuch estate; it bears upon property to a very large amount in the March estate; it bears upon the interests of all persons, who claim under the disposition made by the Duke of Queensberry, of his sup-

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posed great fortune ; a decision against those persons, therefore, is a decision that strikes very strongly against very large interests, which they are contending for : on the other hand, your Lordships are to recollect, that a decision, that will support their interests, is a decision that goes to cut down what is contended on the other hand to be the absolute right of the Duke of Buccleuch ; and it is further stated, and stated with great probability of truth, that if a Scotch entail could be got rid of in effect by the means which the Duke of Queensberry has used, the present holders of most of the entailed estates in Scotland (I mean where there are not special prohibitions and special clauses about leasing), may destroy the hopes of all persons, who feel themselves at this moment entitled to those estates in expectancy.

My Lords, With respect to the Buccleuch entail, your Lordships will find the disposition and tailzie bears date the 25th December, 1705, it was registered in the Register of Tailzies the 21st February, 1724, and the Books of Sessions, 17th June, 1724. The recital of this is in these terms : “ Forasmuch
“ as we having considered the state and condition
“ of James Earl of Drumlanrig, our eldest lawful
“ son, are fully convinced of his weakness of mind
“ and unfitness to manage our estate, or represent
“ us in our dignities and in our said estate, and
“ being well resolved to leave no place for any
“ question concerning the said James Earl of Drum-
“ lanrig his condition and capacity after our de-
“ cease, for preventing all process or arbitrement on

“ that subject, or on the succession to our honours
 “ and estates, and also for preventing the snares that
 “ may be laid for the said James Earl of Drumlan-
 “ rig, to the visible prejudice of our estate and fa-
 “ mily ; therefore, and for the other weighty causes
 “ and good considerations us moving, we have
 “ thought fit (with and under the reservations, con-
 “ ditions, provisions, limitations, restrictions, clauses
 “ prohibitory, irritant, and resolute, under written,
 “ allenarly and no oyrways), to be bound and obliged
 “ to sell, annailzie, and dispone.” Your Lordships
 will recollect, it has always been contended, that
 these words have, and must have some technical
 narrow meaning, and yet you perceive the very first
 word which occurs is the word sell, which has
 certainly a definite meaning in the law of England,
 and in the law of Scotland, and yet it is here un-
 questionably applied to a gratuitous deed, “ to sell,
 “ annailzie, and dispone, like as we by these pre-
 “ sents, sell, annailzie, and dispone.”

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Then the deed states the institute and substitutes,
 reserves life-rents, provides an annuity for James
 Earl of Drumlanrig, creates an obligation for the
 payment of the entailer's debts, and the powers re-
 served to him ; and then there is this clause, “ That
 “ notwithstanding the right of fee of the said whole
 “ earldome, lands, baronies, and others above speci-
 “ fied, be devolved and secured by this present dis-
 “ position and tailzie, in favours of the said Lord
 “ Charles Douglas and his foresaids, and the other
 “ heirs of tailzie above mentioned, yet it shall be
 “ lawful for us to contract debts which shall affect
 “ the said Lord Charles Douglas, and the heirs of

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“tailzie, and the foresaid tailzied estate, in the
 “same manner as if they were consenting with us
 “in the several bonds, contracts, obligations, dis-
 “positions, or other writs whatsoever to be granted
 “by us, or as if they were seryed heirs to us in our
 “lands and estates; and also, it shall be lawful to
 “us to sell, annailzie, and dispone the said lands
 “and others above and after mentioned in the whole
 “or in part, redeemably or irredeemably, for what-
 “soever cause, or in whatsoever manner of way;”
 an expression which seems to intimate, that the
 author of this deed, when he uses the words “sell,
 “annailzie, and dispone in whatsoever manner
 “of way,” must have had in his contemplation the
 different ways in which selling, alienation, and
 disposing, might be effected, “and to revoke, alter,
 “or innovate this present disposition and tailzie,
 “and order of accession, in whole or in part, and
 “generally to do every other thing without consent
 “of the said Lord Charles Douglas, and the other
 “heirs of tailzie, and others above and after men-
 “tioned, as freely in all respects as we might have
 “done before the making hereof, or as if these
 “presents had never been made nor granted; and
 “likewise, by the tenor hereof, it is expressly pro-
 “vided.” I am now about to state the prohibitory
 clauses to your Lordships: “Provided and declared,
 “and so to be provided and declared in the instru-
 “ment of resignation, charter and infeftments to
 “follow hereon, and in all the subsequent procura-
 “tories of resignation, retours, precepts of infeft-
 “ments, and rights of the said estates, that it shall
 “not be lawful to the said Lord Charles Douglas,

“ and the heirs-male of his body, nor to the other July 9, 1817.
 “ heirs of tailzie above mentioned,” the very ex-
 pression in the Duntreath case, “ nor any of them,
 “ to sell, wadset, or dispone,” not using in that QUEENS-
 prohibitory clause the word alienate, “ to sell, &c. BERRY
 “ any of the aforesaid earldome, lands, baronies, LEASES.
 “ offices, jurisdictions, patronages, and others fore-
 “ said, nor any part of the same, nor to grant in-
 “ feftments of life rent or annual rent out of the
 “ same ;” which words I apprehend contain a pro-
 hibition, which would be contained in the word
 alienate ; “ nor to contract debts, nor do any other
 “ fact or deed whereby the same, or any part thereof,
 “ may be adjudged, apprised, or any ways evicted
 “ from them, or any of them, except so far as they
 “ are empowered, in manner after mentioned ; nor
 “ to violate or alter the order of succession foresaid,
 “ any manner of way whatsoever : and also with
 “ this provision, that the eldest heir-female and
 “ tailzie above specified, and the descendants of
 “ their bodies, shall exclude the younger and her
 “ descendants as heirs-portioners, and shall succeed
 “ always without division ;” the author of this deed,
 therefore, intending as one of his purposes, to keep
 the whole of the estate in one individual ; “ and that
 “ the whole heirs and descendants of their bodies
 “ so succeeding, shall be obliged in all time coming
 “ upon their succession, to assume, and use, and
 “ bear, the sirname of Douglas,” thereby also ex-
 pressing his anxiety that it should be a Douglas,
 “ and the title, designation, and arms of the family
 “ of Queensberry, as their own proper sirname,
 “ title, and designation ; and that the said Lord

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“ Charles Douglas, nor the other heirs of tailzie
“ above specified, shall not set tacks nor rentals of
“ the said lands for any longer space than the setter’s
“ life-time, or nineteen years.” “ Shall not set
“ tacks or rentals ;” rentals may be represented to
your Lordships as a species of tack held by what
are called in Scotland, Kindly Tenants, who usually
pay, if not always, what is called entry-money,
“ and that without diminution of the rental, at the
“ least at the just avail for the time.” Here the
words, “ the rental,” cannot mean the same thing
as the word rentals used before, but it means rent;
I take notice now, that it has been insisted, that this
clause itself shows, that it was lawful to take
grassums, because it is said, you shall not set tacks
nor rentals of the said lands for any longer space
than the setter’s life-time, or for nineteen years, and
that without diminution of the rental ; then they
say, if you set a rental, taking what they call entry-
money, you cannot set a rental of that sort without
a diminution of the rent, if taking grassum is dimi-
nution of the rent : Whether taking a grassum be a
diminution of the rent, will be to be considered by
and by ; but this reasoning upon the application of
the words “ diminution of the rental,” to rentals,
where entry-money is taken, has been met by ar-
gument against it in the papers on your table.
Then follow these words, “ without diminution of
“ the rental, at the least at the just avail for the
“ time.” The construction the Court has put upon
these words, and has put upon these words without
the least expression of doubt that they rightly con-
strue them, is this ; they say, that it should be read

“without diminution of the rental, *or* at least at July 9, 1817.
 “the just avail for the time,” meaning that you
 should take the old rent, but, if the circumstances
 of the times do not allow you to obtain the old
 rent, you shall at least let for the just avail at the
 time, that is, for such rent as you can reasonably
 get, and that you must get that by auction, or in
 some other mode. I own, I think that a little
 doubtful, because you must construe the words
 “at least” recollecting that the word “or” is no
 part of this deed, and that the words stand, “without
 “diminution of the rental, at the least at the just
 “avail for the time;” and it seems to me question-
 able whether the words “at the least at the just
 “avail for the time,” words, according to the text,
 additional to the words “without diminution of the
 “rental,” can, according to just construction, be
 taken to introduce an alternative, although no such
 word as the word “or” is used to create an alterna-
 tive, and therefore questionable, whether those
 words are really to be considered as the Court has
 construed them,—that you shall take the rent pre-
 sently payable, or, if you cannot get that, you shall
 take such rent below that, as is the just avail at the
 time.

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My Lords, Here I take leave to say again, as I
 took the liberty to say in the Wakefield case, that I
 cannot bring my mind to be much affected by what
 we have heard so much of at the Bar in this case,
 in the Wakefield case, and in others, that if you
 construe a clause of this kind, where you have these
 words, as meaning that you shall, on all occasions,
 get the rent, which is the just avail at the time, a

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court of justice must, in each case, be called upon to determine the fact, whether you have so acted or not. The answer to that is, first, if that be the meaning of the words, there is no more difficulty in construing the instrument, than if those words had been expressly inserted in it:—if it had been inserted in the instrument, that you shall get the rent, which is the just avail at the time, you could not let a lease unless you should get the rent, which is the just avail at the time ; and that it is interposing a difficulty of no consequence, when once you have established the meaning of the words to be the same, to say that that difficulty is imposed, because in each case you must meet it as well as you can. I do not believe there is a marriage-settlement in this part of 'the kingdom, made between year's end and year's end, in which a power of leasing is granted to a tenant for life, in which he is not under the condition of letting for the best rent, which can be got at the time ; and yet, in forty years and upwards, which I have lived in the profession, I do not recollect more than one or two questions at most, arising on such a case as that ; and there is but one criterion which our courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others, as he has for himself ; if he has got more for himself than for others, that is decisive evidence against him : the Court must see that there is reasonable care and diligence exerted, to get such rent as care and diligence being exerted, circumstances mark out as the rent, likely to be produced.

Then the deed proceeds, "nor to do any other
 "fact or deed, civil or criminal, directly or indi-
 "rectly, by treason or otherwise, in any sort,
 "whereby the said tailzied lands and estate, or any
 "part thereof, may be affected, apprised, adjudged,
 "forefaulted, or any manner of way evicted from
 "the said heirs of tailzie, or this present tailzie in
 "order of succession thereby prejudged, hurt, or
 "changed; neither shall the said Lord Charles
 "Douglas, nor any of the said heirs of tailzie, suf-
 "fer the duties of ward, marriage and relief, either
 "simple or taxed, nor the feu, blench, and teind
 "duties, nor any other public burdens or duties
 "whatsoever, payable furth of the said tailzied
 "lands and estate, to run on unsatisfied, so as
 "therefore the lands and others foresaid may be
 "evicted, apprised, or adjudged."

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My Lords, I point your attention to the last clause, because it shows an anxiety on the part of the author of this deed, not only with respect to other public burdens, but with respect to teinds; and I think I shall be able at least to satisfy your Lordships, that the question, whether throwing the public burdens on the old reserved rent is not a diminution of the rental within the meaning of authors of such deeds, is at least a question, that deserves a great deal of consideration before you determine it in the negative. I would illustrate that now, for the sake of leading your Lordships to what I shall say more particularly by and by. Here is one lease let at 3*s.*; the grassum taken is above 200*l.* Now, if we were, instead of considering those great cases which the gentlemen have adverted

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to in their arguments, to take a case of inferior amount of property, the operation of this doctrine would appear. Your Lordships know, that by an act of 1633, teinds are payable out of the estates according to a proportion of the rent, which is paid, or, as the expression is in that statute, of the rent, as constantly paid. Now, in the case I have stated, the rent, as constantly paid, is not the whole rent, that is paid; that is clear enough; but in construing that statute, in order to do justice, the Courts in Scotland, after putting quite a different construction upon it, as we have been told, from 1633 to 1731 or 1732, in 1731 or 1732 said this, When we are valuing those teinds, we are not to value them by looking merely at the rent which is constantly paid, though such is the statute expression, because if we do, the person, who has the land, may let the land for 3*s.* a-year, and may take a grassum of upwards of 200*l.*; then, when the man, who is entitled to the teinds, comes, he will have two fifths, or some certain proportion of 3*s.* What has the Court of Session said? The Court of Session has said from 1731 or 1732, this is not the rent, which is constantly paid; and, while they are contending that grassum cannot be rent, what they say is this, that in ascertaining what is the *rent* constantly paid, the grassum shall be taken into consideration, and that the *rent* shall be, not the 3*s.* but the 3*s.* and one tenth, or some other proportion of the grassum that was paid. See what the consequence may be as to the diminution of the rent, if the man who is to receive 3*s.* a-year, the reserved rent, that is, the old rent under the old lease, is to have his assessment made

upon him, not at the rent of 3*s.* a-year, but at the rent of 3*s.* a-year, *plus* 10*l.* a-year. You may say his rent is not diminished, but then you must determine this, that a man who gets nothing, is in the same situation as if he got something; that is the plain English of it. But I mention this passage about teinds, because it shows that the author of this deed was attending to these things.

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Then with respect to the irritant and resolute clauses, it goes on thus; That if they do not do all these things, or they shall, “ by altering and
“ changing the order of succession, or disposing,
“ selling, wadsetting, or burdening with infeftments
“ of annual rent or other servitudes and burdens,
“ the said lands and others aforesaid, or any part
“ thereof, or by granting tacks or rentals otherwise
“ than as above, or by contracting debts, except in so
“ far as they are empowered in manner underwritten,
“ or by doing any other fact or deed, civil or criminal, by treason or otherwise, whereby the said
“ lands may be burdened, evicted, forefaulted, or
“ adjudged;” then it refers to public burdens again, those are all to be paid: and there is a resolute clause, evicting the estate from the person who does those acts. Then there is a provision, that the next heir shall, in such cases, succeed, the succession opening again to the person who would have taken. If the father contravenes, the son shall succeed, “ reserving always to the person, who shall
“ succeed by virtue of the contravention, the rents
“ and profits of the said estate, until the existence
“ of the said nearest heir, with the burden of the
“ payment of current annual rents and public burdens;” so that the person, who was to take the

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estate, you see, was to take it with the liability to public burdens, that is, if you were to suppose that persons in this part of the world would descend so much from their dignity as to make an entailed estate of 3*s.* a-year with a grassum of 200*l.*, the man with the 3*s.* would be bound to pay the public burdens, though he had but 3*s.*

Then there is the clause, "That it shall be lawful to, and in the power of, the said Lord Charles Douglas, and of the other heirs of tailzie above specified, whether male or female, to provide and in-
"fest their lawful spouses in competent life-rent
"provisions of a part of the lands and estate, not ex-
"ceeding the sum of 1000*l.* sterling of yearly rent." Now, I beg leave to state to your Lordships, that this is a clause which I think deserves more attention, than has been given to it; for this is an estate, which it was in the consideration certainly of the author of this deed should always be such an estate, as would give to the spouse of a lady, or to the spouse of a gentleman, for both males and females are provided for, "in competent life-rent
"provisions of a part of the said lands and estate,
"not exceeding the sum of 1000*l.* sterling;" of course leaving to the heir of entail a property, that was useful and valuable to him, after that 1000*l.* sterling was paid to the spouse; but it is not only that, but "if there shall happen to be two life-rent
"provisions upon the said estate, then and in that
"case the second life-rent provision, during the
"existence of the first, shall not exceed 800*l.*
"sterling;" so that there is 1800*l.* if there are two. Then, thinking it not improbable there might be three, there is a third provided for, which is not to

exceed 500*l.*; so that 2300*l.* may be the burden upon this estate at the same time. Now, when your Lordships come to see, that the Duke of Queensberry, when he came into possession of his estate in 1778, received an estate, which netted to him about 11,300*l.* a-year; and when, instead of letting that estate from time to time, with such a rise in the rent, as the circumstances of the country would enable him to get for it, he lets it at the old rent of 11,300*l.*, taking grassum upon grassum, three times over in some cases; when you recollect that, which I have before intimated to your Lordships, that the public burdens are to be assessed, not with reference to the rents, but to the grassums, or a proportion of the grassums (in other words, that rent, and a proportion of grassum, are understood to be meant by the words 'rent constantly paid'), you will not be very much surprised when I state to your Lordships, as we are informed, that that estate, which in 1778 yielded to the Duke of Queensberry 11,300*l.* in the year 1817 pays to the Duke of Buccleuch, provided he has not three jointresses upon it, the sum of 3600*l.* Nevertheless it is a question in law, and a nice question in law, whatever it may be in any other view of the case, whether a rent of 11,300*l.* still a nominal rent of 11,300*l.* a-year, the estate yielding only in true rent 3600*l.* a-year, and which may happen to be subject to three jointures, is a rent that can be at all impeached, in the sense of the law, for diminution?

My Lords, Besides this, the heir of entail is empowered to provide the younger children of the marriage with a sum of 3600*l.* for their portions;

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so that he may have upon this estate, which it is contended may be thus let, 2300*l.* for jointresses, and 3600*l.* for younger children. I have pointed out all these clauses of the entails to your Lordships, because it does appear to me that they are very material.

It may be now necessary to state to your Lordships shortly, the effect of the other entail,—the March and Neidpath entail. My Lords, that deed of entail is likewise important in some parts of it. That entail is dated the 12th October, 1693, and was recorded in the books of Session the 3d Sept. 1781. There are, first, the clauses which are usually found ; and then there is a clause in these words: “ That it shall be always lawful to, “ and entirely in the power and liberty of, the said “ William Duke of Queensberry, by himself alone, “ at any time during his life, without consent of “ Lord William Douglas, or any other of the heirs “ of tailzie, and so on, to sell, alienate, and dispose “ the foressaid lands of Newlands,” and so on ; and then the way in which the power is given to set tacks is this, “ reserving power and liberty to “ the said William Duke of Queensberry, during “ his life-time, to set tacks of the haill lands, baronies, and others immediately above rehearsed, “ for payment of such yearly duties, and for such “ space and endurance as he shall think just.” The author of this entail, therefore, reserves to *himself* the power of setting tacks as large as he pleases ; but when he comes to give the power to others, he says, “ It shall not be lawful to Lord William “ Douglas, and the heirs male of his body, nor to

“ the other heirs of tailzie respectively above men-
 “ tioned, nor any of them, to sell, alienate, wad-
 “ set, or dispone any of the said hail lands, and
 “ so on above rehearsed ; nor to grant infestments
 “ of life-rents, nor annual rents, forth of the same ;
 “ nor to contract debts, and so on ; and the person
 “ contravening is to lose his estate : But he says,
 “ it is expressly provided and declared, that not-
 “ withstanding the irritant and resolute clauses
 “ above mentioned, it shall be lawful and compe-
 “ tent to the heirs of tailzie above specified, and
 “ their foresaids, after the decease of the said Wil-
 “ liam Duke of Queensberry, to set tacks of the
 “ said lands and estate during their own life-times,
 “ or the life-times of the receivers thereof, the same
 “ being always set without evident diminution of
 “ the rental ; and likewise, that it shall be lawful
 “ and competent to the said heirs of tailzie to grant
 “ suitable and competent life-rent provisions in fa-
 “ vour of their wives, not exceeding the sum of
 “ 5000 merks of yearly *free rent* of the said estate,
 “ and to grant provisions in favour of their children,
 “ not exceeding two years’ free rent of the same.”
 Your Lordships observe the expression, “ 5000
 “ merks of yearly free rent of the said said estate,”
 and the expression, “ yearly free rent of the same,” at
 the close of the paragraph. And in this deed there
 is this distinction also, that it does contain the word
alienate in the prohibitory clause.

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Having stated this deed to your Lordships, I will
 proceed. I promised your Lordships, I fear, more
 than I can possibly perform, because it appears ne-
 cessary, in order to lay the groundwork, to call your

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Lordships' attention to the statute of 10th Geo. III. which one of the interlocutors I have read states to have fixed the term of nineteen years. My Lords, that statute recites, "That by an act of the Parliament of Scotland, made in the year 1685, entitled, An act concerning tailties, all his Majesty's subjects are empowered to tailzie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolute clauses as to them shall seem proper," a recital which, by the way, tends, as your Lordships observe, to clear up a question which occurs in all these cases, what is the effect of inserting in these tailties other provisions and conditions than those which are expressly mentioned in the statute; "and which tailties, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever," a recital quite correct. Your Lordships recollect, that the statute of 1685 is not effectual as against purchasers and others, unless the tailzie is registered in the manner directed by the said act.

Then follow these words: "And whereas many tailties of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tacks or leases of a longer endurance than their own lives, for a small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public." Your Lordships will see that expression is not common sense; but on look-

ing at the original roll of the Parliament office, it is found, that this is printed with the omission of that word, which they may very much desire to have in the Buccleuch entail, the word *or* “ of a longer en-

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“ durance than their own lives, *or* for a small number of years only.” Now, to prevent that mischief, it is thereby enacted, “ that it shall and may be lawful to every proprietor of an entailed estate within that part of Great Britain called Scotland, to grant tacks or leases of all or any part or parts thereof, for any number of years not exceeding fourteen years, from the term of Whitsunday next after the date thereof, and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof, or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them, or for any number of years not exceeding thirty-one years from the term aforesaid.” This clause, therefore, is a clause which enables every proprietor of an entailed estate to let according to this clause, whatever may be the clauses in his deed of entail ; but if he does let according to this clause, then, by virtue of a subsequent section, he can only let under the particular restrictions and conditions which in such case this act imposes. “ Every such lease for two lives shall contain a clause obliging the tenant or tenants to fence and enclose, in a sufficient and lasting manner, all the lands so leased within the space of thirty years, and two-third parts thereof within the space of twenty years, and one third part thereof within the space of ten years, if the said

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“ lease shall continue for such respective terms,” the Legislature calculating, that a lease of thirty-one years would be about as long as two lives ; “ and “ that every such lease for any term of years exceeding *nineteen* years shall contain a clause obliging “ the tenant or tenants to fence and enclose, in like “ manner, all the lands so leased during the continuance of such term, and two third parts thereof “ before the expiration of two third parts of such “ term, and one third part thereof before the expiration of one third part of such term.” Then there is a clause compelling the tenants to keep up the fences. Then there is a clause enabling every proprietor of an entailed estate, without exception, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years ; but that is followed by a clause limiting the number of acres he is to let for that purpose.

Then there follows the clause “ that the power of “ leasing hereby given shall not in any case extend “ to or be understood to comprehend a power of “ leasing or setting in tack the manor-place, office- “ houses, gardens, orchards, or enclosures adjacent “ to the manor-place.” That clause was introduced in consequence of what is the known law of Scotland ; that although we say, in a sense, and in a strong sense, that the heir of tailzie is the absolute fiar and proprietor, and so on, unless so far as he is limited, yet it is extremely clear he is limited, though there are no conditions in the deed of tailzie ; and he is limited, as your Lordships will recollect, by a judgment we have had here, from letting the manor-house, and the lands about the house, it being

understood that it shall be kept up, and shall not be let. Then there follows these words: "That all leases made or to be granted under the authority of this act" (for the Legislature seems determined to put this out of the question as to such leases as they authorized, but I cannot agree with what is said in another place, that because they meant to put this out of the question as to such leases as they authorized, therefore they put it equally out of the question as to all other leases), "shall be made or granted for a rent not under the rent payable by the last lease or sett, and without grassum, fine, or foregift, or any benefit whatsoever, directly or indirectly, reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises, or that such lease, if granted for a time certain, shall be within one year of being determined: and that all leases otherwise granted shall be void and null;" then it is "provided and declared, that if any tailzie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers in the same manner as if this act had never been made;" the Legislature, therefore, authorizing us to say, that deeds of entail, if they cannot contain prohibitions about leasing by implication, may at least contain by implication powers and permissions to do so.

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Now, my Lords, upon the construction of all these clauses taken together, this act of Parliament

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says, that if a lease is for more than nineteen years, such and such things shall be done; and I apprehend the meaning of this act is this, that if you do things beyond your power of leasing, which, being beyond your power of leasing, you can do only by the authority of this act, that every thing you so do shall be done according to this act. This act seems to me not to be the foundation of the right, if there be such a right, of the heir of entail to let for nineteen years, unless he is specially prohibited: It speaks, indeed, of leases made under the authority of the act exceeding nineteen years, and under what restrictions and conditions such leases are to be made; but it does not appear to be an act declaring that, independently of the effect of the act, any heir of tailzie, not specially prohibited, may make a lease for nineteen years. It seems, however, upon reading this statute, very reasonable to suppose, that the person who drew this act thought that the *presumpta voluntas* would give a power to grant leases for nineteen years.

I will now proceed to state to your Lordships what are the actual facts of this case, always taking the liberty to repeat, I may very much mistake the case, but I have never been able to look at it without considering it as a matter of some importance, that the action, in which all these leases have been held to be good, is an action at the suit of the Executors and Trust-Disponees of the Duke, standing in no other right than that in which the Duke himself would have stood if he had been in Court. I proceed now to state what I conceive to be the facts of this case.

It has been represented to us, that the grantor of

this deed of entail never had let with grassums. He was succeeded by his son Charles Duke of Queensberry : commissioners were appointed to manage his estate, and it is undoubtedly the fact, and an important fact to be recollected in the consideration of this case, not only that in his time leases were let, though for comparatively short periods, but that they were let also for grassums, and they were not only let for grassums, but they were let for grassums by commissioners, some of whom were persons unquestionably in the highest situations in the law in that country ; and therefore it is fit to be recollected, that those persons must either have thought, and I think it but fair to say that they must have thought that they had power to grant such leases, or that they were determined to take the chance in the case of a young man who might outlive all the short leases they might grant. I think it is not proper to take it in the latter way, but that the Executors of the Duke of Queensberry have a right to the inference, that the persons who made those leases thought they were entitled to make those leases in point of law ; and I think, if they so thought, that their opinions are deserving of considerable weight.

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My Lords, As I understand it, the taking of grassums was discontinued before the death of Duke Charles in 1772, and the rental, which in 1720 had been about 6500*l.* was increased to the sum of about 8000*l.* The late Duke succeeded to the estate in 1778 ; at that time, unless I have collected the facts of this case inaccurately, there were no leases for

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grassums on the estate. My Lords, It has been stated to your Lordships, that the Duke of Queensberry went to great lengths in cutting down all the timber upon the estate. I make no observation upon that; he had a right to cut down all the timber upon the estate if he thought proper, and the same as to the house; he so dealt with the house, I presume, as he had a right to do, for I do not find that made the subject of complaint; but though he had a right to cut down the whole of the timber upon the estate, I apprehend, that, in point of law, however much he may have been entitled to be represented as monarch of his estate, he could have made no contract that would have given any person a right to cut down that timber after his death, though he could have sold the whole of it for 30,000*l.* now paid, and if the wood was severed from the land before he died, the purchaser would have the benefit of the bargain, but if it was not severed from the land before he died, then he would not have the benefit of the bargain; and I apprehend, that if he had sold wood to the amount of 30,000*l.* to be paid *de anno in annum* 1000*l.* whatever was uncut at the time of his death, the person, who had so bought that wood, could not touch a stick of it: so that if a person sells wood to be cut off an entailed estate after his death, whatever may be his disposition to carry his prerogatives high as the monarch of the estate, that is one particular in which he cannot do so, for he cannot sell wood to be cut after his death.

My Lords, About the year 1796, there having been a good deal of dealing in grassums before, the

Duke of Queensberry having been very well advised, when I say very well advised, I mean advised by a person whose advice would have considerable weight, set about leasing all the estate for grassums; and until the Wakefield case disturbed the idea, which had been entertained, there was no further interposition; but at length, by a sort of act on his part, which I cannot represent, as far as he is concerned, to be an individual act with tenant A. or tenant B. but by an act of his, connecting himself with all the tenants of the estate, he made leases of the nature and kind, which I have endeavoured before to state to your Lordships, which I can now, having examined the case pretty accurately, state more correctly, by dividing them into four classes of leases.

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There were leases granted to the tenants on renunciations of tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases to grant new leases for nineteen years annually during the Duke's life. There were leases granted where the current leases had actually expired under similar obligations. There were leases granted without an obligation of renewal, but where the leases then current were not near their natural expiration; and there were leases granted without an obligation to renew, and which were not granted till the previous leases had expired.

In the first of these classes, if the person had a current lease for which he had paid a considerable grassum, we will say at the end of nine or ten years, the Duke enters into a new contract with him, and lets him a lease for nineteen years, taking another

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grassum, so that there has been a grassum paid as a consideration for the first lease,—a grassum as a consideration for the second lease, besides which, if the bargain was made with a stranger, he had, in order to come in, to pay a sum to the tenant in possession for a renunciation: and in the contract there was an obligation to renew *de anno in annum*. In such a case as that (I am not now observing upon the lawfulness of it, but upon the fact), you will observe, that the Duke of Queensberry got one grassum when he let the first lease, and that, long before the second lease was expired, he got another grassum; and having got both these grassums, he enters into an obligation to renew *de anno in annum*, which, whether it was legal or not, is a circumstance which must be represented as a consideration given on his part for the grassums, which had been so paid.

My Lords, I will give you examples of each class of leases, if your Lordships will take the trouble to look at them.—There is a lease of Crawick Mill, No. 69 of those that are libelled, the rent of which was 27*l.* 10*s.*; the consideration for this was the renunciation of the former lease for nineteen years, in which the grassum appears to have been 335*l.* paid at Whitsunday, 1796; and at Whitsunday, 1798, a further grassum of 447*l.* 15*s.*; so that upon that you observe that there are two grassums paid in the course of about three years, amounting to about 700*l.* upon a rent of 27*l.* 10*s.* I will not trouble your Lordships with other instances of this class; but the second class was where the leases had actually expired, and No. 67, for instance, is a lease renewable with the annual rent of 7*l.* 15*s.* a grassum

being taken of 255*l.* Then there are leases granted without the obligation to renew; two leases, No. 212 and 147, granted each at the rent of 1*l.*; and there are three grassums taken in each of these cases; in the first case, 63*l.* at Whitsuntide, 1788; 18*l.* at Whitsuntide, 1806; and at Whitsuntide, 1807, 170*l.* 10*s.* making 251*l.* 10*s.*; and, in the second case, 103*l.* 48*l.* and 83*l.* making 234*l.* I have taken the trouble to put down the amount of the various sums paid as grassums, in order to show what the actual operation of this is, stating it again as a question, whether this is legal or not. Then, in the fourth class, there are three or four stated, and one is a lease of 1*l.* 11*s.* 6*d.* on which the sum of 171*l.* was paid; and another is that instance, which I mentioned to your Lordships, which you will find to be No. 267 of the libelled leases, where the rent is 3*s.* and the grassum paid for that lease is 231*l.* 3*s.*

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My Lords, The amount of the several sums, which the Duke received in grassums, is stated very differently; but the result of the whole of this operation is, that the rent, which was a free rent in 1778, as I before mentioned to your Lordships, according to the representation of the case to us, of 11,300*l.* (there was no rise in any instance in the Duke's time, he taking grassums, and not only taking grassums in all his leases, but receiving fresh grassums, and receiving those fresh grassums, as they assert, in concert with all his tenants), was, at the death of the Duke, 3600*l.*, chargeable, as your Lordships observe is stated by the entail, with a jointure of 1000*l.* if there

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was one Lady, and another jointure of 800*l.* if there were two, and another of 500*l.* if there were three; and chargeable also with 6000*l.* or 7000*l.* for children; and the question then is, Whether the interlocutors which I have read to your Lordships, are interlocutors, which do justice to the parties, stating their respective claims against each other.

Now, my Lords, when this case was argued before the Judges of the Second Division, as I have already stated to your Lordships, they were of opinion that there was no diminution of the rental according to the true intent and meaning of the entail, they construing the words "without diminution of the rental, at the least at the just avail for the time," as if the words stood "without diminution of the rental, *or* at the least at the just avail for the time;" and it is material to mention this, because it may be the ground of some misapprehension as to this case hereafter. As to that, I understand the fact to be, and if I am mistaken in that I shall be glad now to be set right, that that word "*or*" is not inserted in the deed of tailzie. The Judges of the Second Division of the Court of Session have certainly understood the case as I understand it; the word "*or*" is no part of that deed, and that therefore the clause stands thus: That the heir of entail is to let for his own life-time, or for nineteen years, without diminution of the rental, at the just avail for the time.

My Lords, Upon that part of the case, I have before taken the liberty to intimate to your Lordships (and I speak here with great diffidence when

speaking on Scotch instruments), if this were an English instrument, I cannot find out the principle, upon which I should be entitled to insert that word "or," if those words were, as they are here, without diminution of the rental, at the just avail for the time; the very circumstance of having the words, at the just avail at the time, must show that the author of the deed meant something else besides "without diminution of the rental." Then does it alter that, if you introduce words which still make the nature of the concluding words stronger? The question will be, Whether, because in many cases the words "diminution of the rental" have been held to mean diminution of the rental presently paid; therefore the words "diminution of the rental," when found in a context sufficient to give them a different sense, and where there is no word creating an alternative, are to be taken in that sense? I do not state that that difficulty is a difficulty which cannot be got over; but, speaking most respectfully, I cannot agree in that, which has been laid down, viz. that there can be no reasonable doubt about it.

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They have further held, that the taking grassums, and I must suppose they have held, that taking grassums, under all the circumstances, under which the Duke has taken them, is not to be considered as a diminution of the rental; that the words "diminution of the rental," affected in their sense, or not affected in their sense by the subsequent words, are to be taken to mean without diminution of the rental presently paid; and, if so, that they may not only take grassums at the expiration of the

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leases, but that they may take them at regular times, calling in by renunciation those leases ; that, calling in those leases by renunciation, they may then take another grassum. The amount of the grassum paid appears generally to be, and I believe the fact is generally that it is, calculated with reference to the rent, and the intended endurance of the tack, when the lease is granted ; they hold that you may call it in by renunciation, and that, on the tenant surrendering from time to time, if that plan is adopted, and acted upon, there may be at all times a nineteen years' lease upon the estate.

My Lords, I have before stated to your Lordships, that this opinion of the Judges of the Second Division of the Court of Session is an opinion, which, to me at least (I do not mean to say that it is not according to the law of Scotland, but that it is an opinion, which to me at least) is irreconcilable to the principles, upon which the First Division had given their judgment ; though the circumstances are not exactly the same, nor the modes of considering them perhaps exactly the same, yet they do apply principles in the one case to the construction of deeds of entail, which are altogether different from those, which are applied by the other Division to the construction of deeds of entail ; and we are therefore now involved in this situation, that the person, who has the honour to address you, most unfeignedly would represent that he is under the painful difficulty of coming to a determination, whether the Judges of the one court or the other are right in their decision ; and to come to the determination,

previously to deciding such a question, whether, in a case of this sort, you have now all the information that you ought to have, before you should come to a decision.

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Now, My Lords, there is one view of this case, which appears to me also to have been (I mean to speak most respectfully) but slightly treated in the Second Division of the Court, and what I mean is, whether there is not a diminution of the rental in this case. My Lords, the Judges of that Division, I see, have said, that where an entailed estate is let at the rent presently payable, though the rent presently payable may be reduced, as to the free rent received, very considerably by the public burdens and charges, yet, nevertheless, that is not a letting with a diminution of the rental, and, my Lords, I agree there may be cases, in which that doctrine is right; but I do entertain a very considerable doubt, whether in a case, circumstanced as this case is, there be not occasion to consider somewhat more, whether the effects of these transactions is not, in the sense and the meaning of this entailor, or according to the expressions of this entailor, if you choose rather to have it so, a diminution of the rental.

My Lords, I before stated to your Lordships that remarkable case of the 3*s.* rental, and 23*l.* grassum. I do not know how it may be in the law of Scotland, nor do I pretend to speak with any confidence, very much otherwise, but I have no conception, that if this was the construction of an English instrument, I should not be called upon to attend somewhat to this distinction. If I am called upon to let at the

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last rent, and it should happen that, after letting at the last rent, public burdens are imposed, the property-tax for instance, which the tenant is to pay, I have nevertheless fulfilled the obligation which the instrument placed upon me ; but the case I apprehend may be very different, when you come to consider, not public burdens which may hereafter be imposed, but public burdens affecting the rent at the time, as, for instance, in this case, with respect to the teinds ; here is a difficulty which has certainly induced me to think, and often to think, that this case wants further consideration. It is clear, as I understand the facts of the case, that from the year 1633, when the statute passed about teinds, down to the year 1731, the valuations were made upon the actual rent paid, the words of the statute being, that they should be charged upon certain proportions of the *rent constantly paid*. My Lords, In the year 1732, or thereabouts, the Court of Session said, this cannot be right ; it cannot possibly be what the statute meant by the *rent constantly paid* ; there must be such a meaning put upon these words, as that justice may be done to all parties concerned ; and therefore, if you let with a *grassum*, in estimating what is the rent constantly paid according to the meaning of that statute, you shall not say that the rent rendered is the rent presently paid, but you shall take a proportion of the *grassum*, according to what would have been the rent paid but for that *grassum*. See, My Lords, what is the effect of that as to entailed estates. Here is a lease let, and let at 3*s.* that is the rent constantly paid ;— here is a *grassum* paid on that lease of 23*l.* 1*0s.*

Does the heir of tailzie receive 3*s.*?—No. When he comes to account for the teinds, the court says, the grassum must be considered in ascertaining the rent constantly paid in the sense of that statute; for the purpose of doing justice grassum is rent, and we will therefore take a proportion of that 231*l.* the grassum, and add it to the money received, the 3*s.* and you shall pay your teinds according to the amount of the rent calculated on the addition of the 3*s.* to that proportion of the grassum. My Lords, I do not say whether that is annailzieing or not, I do not say whether it is disposing or not, I do not say whether it is or is not diminution of the rental; but this I know, that, if the Duke of Queensberry could let at 3*s.* because he could maintain that there was no diminution of the rental as against the heir of tailzie; and the heir of tailzie, on the other hand, is to pay the burden of teinds on a proportion of the grassum received by the Duke, in addition to the 3*s.*—the rent constantly paid or reserved to that heir of tailzie,—the heir of tailzie, unless I misunderstand the matter, must have that, which is not worth his acceptance.

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Now, my Lords, if you apply the difficulties, which arise in the case so put, upon the 3*s.* rent, to the case in all its circumstances, how does it vary? It varies only in this; you are struck with that way of putting it, when you put it on the 3*s.* and 231*l.*,—but you are not quite so much struck, when you put it on the rent, which in 1778 was 11,800*l.* a-year, and which, by letting in this mode, is reduced, not as to that, which the Duke of Queensberry has reserved, but with reference to the

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proportion which the law takes in respect of all these grassums, is reduced to the free rent of 3600*l.* a-year, —a free rent of 3600*l.*, capable of being burdened, according to the terms of the entail, with three jointures of 1000*l.*, 800*l.*, and 500*l.*, and with 6000*l.* for children, that deed of entail providing anxiously too that the heir of entail shall from time to time pay the public burdens!—This, my Lords, is surely a case of very considerable importance,—a case which requires much of consideration, before we can be quite convinced that all this is according to clear law. Whatever was the law as to teinds in 1732, was the law as to teinds before 1732, before the entails in question were made, and was the law in 1633;—the construction has been different, but the law was always the same, and the true construction of it was always the same; and when the court put a new construction upon the words ‘*rent constantly paid*’ as to tithes, they seem to have placed heirs of entail in circumstances very different from those in which they stood in point of interest in the entailed estate, before that new construction as to teinds was adopted.

My Lords, The courts have also differed as to the principles on which they have construed this entail.—One court says, that the heir of entail is to be considered, as I before stated it, as absolute fiar of the estate,—that he is the absolute monarch of the estate, with this exception, that he is such, so far as he is not fettered; and, when we inquire whether he is fettered or not, we are told that he is not to be fettered by implication, that he is not fettered unless where he is expressly, in clear terms and expression, fettered; that there are no fetters

created by words, unless they are such words as July 9, 1817.
 that he who runs may read, and may understand
 them; that such were the terms used by a very
 great Judge. I ask in what way the Court of Ses- QUEENS-
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 sion understands the terms so used by that great
 lawyer.

My Lords, That the heir of entail is a liar,—that he is the proprietor,—that he is not to be considered as fettered, unless he is by express words fettered, and that he is not to be fettered by implication, is, generally speaking, doctrine not to be questioned. But that all decided cases sustain, without exception, these doctrines, I cannot agree, and I cannot admit that an heir of entail is not fettered in some way, in some cases, in some circumstances, otherwise than as he is expressly fettered. My Lords, I cannot find in all these papers, in any author I have had access to, in any book, nor have I heard from any mouth, that though a deed of entail contains not one single word, no provision whatever, against lowering the rent, the heir of entail can let below the last rent, unless in the case, in which it is impossible that he can get it. I should be glad to know how it happens that, if it be true, according to the printed opinions, that if a restriction is not expressed in the deed of tailzie, that is a restriction that no heir of entail is under, they all admit, every one of them, that the heir of entail, if he can let for ninety-nine years, if he can let for a grassum, because he is not prohibited so to do, yet cannot let below the old rent, though there is no such prohibition in the tailzie? upon what does that rest? There may be, for aught I know, a very satisfactory account of it,

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but I have not seen it. Again, with respect to the letting the mansion-house, and the grounds about the mansion-house, cannot an absolute fiar, an absolute proprietor of his estate, let his mansion-house, and the grounds about the mansion-house? and yet, although there be no such prohibition in the deed of entail, it is quite clear that an heir of entail cannot do it. That has been decided over and over again in the court below and here. Then, does not all show, that there may be implied obligations, some such obligation, as requires him to attend in some sort, or some manner, to the intent of the author of the deed, beyond that by which an absolute fiar is bound? It is said, that an heir of entail cannot let on an elusory consideration; in short, there are decisions which authorize one to say, that when the doctrine is laid down in the very strong terms in which it is, it must be taken to be a doctrine laid down with the exception, if I may so express it, of the excepted cases.

My Lords, I do know certainly that decision has gone a very great way in limiting construction, and that construction has been limited in cases, in which one can hardly understand the principles, on which it was limited; but I should be the last man in the world to deviate from rules, which have been laid down, for I look upon it, that certainty with respect to titles is a great deal better than even sensible rules of law, or sensible rules of construction. Speaking with all deference, I never could have consented to the decision in the *Duntreath* case. There is no more doubt that that case was decided against the meaning of the author of that deed,

eye, and against the expression of that deed, than that I am standing at this table; but I will not break in upon what has been settled by that case, for the importance of abiding by what has been considered as settled law can never be represented too forcibly.

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Next, my Lords, With respect to grassum, let us try what there is of reason and consistency in the law as we have heard of it, and as it is said to be extracted from the Westshields, and other cases. If I say to a man, Sir, you shall have a lease for nineteen years, and you shall give me for that lease a couple of thousand pounds grassum, and I will make the rent so much less than it otherwise would be; it is contended, upon the authority of these cases, that this heir of entail may put the 2000*l.* in his pocket, and make a valid lease, as it respects the person to succeed him. But he cannot say to the proposed tenant, I will make you a lease at 100*l.* a-year, and you, instead of paying me the money now, shall give me a bill or a bond for the payment of so much annually, not as *rent*, we will not call it *rent* for the world, but, instead of paying me a grassum of 2000*l.* at this time in my hand, you shall give me a bill or a bond to pay it me at twenty different payments, to be made at the periods when the reserved rent is payable; this is not grassum, however much like it, but rent. Pay me now, the thing is safe against the next heir of entail;—pay me in future,—accept the benefit of credit which I give you (the thing in effect the same as if you had paid me now, and I had lent you the money to pay, upon the same credit), that is not safe against the next heir of entail;—but he, when he comes into

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possession, shall have the future payments. If I, an heir of entail in possession, let black acre for 100*l.* a-year, and 1000*l.* paid into my pocket that morning, the lease is good, and he who succeeds to me is to have only the 100*l.* a-year; but if, on the same day, I let white acre at 100*l.* a-year, and desire the tenant not to trouble himself, but to suit his own convenience, by paying the sum of 1000*l.* by certain instalments, these shall be deemed rent; and in the one case the lessor is to have the whole 1000*l.*, in the other he is not. So as to wood; the heir in possession, it is said, may sell it for present payment, or for payment at present in part, and for payments by instalments afterwards. If the wood is cut down in his life-time it is well; but the purchaser cannot cut a stick after the death of the heir, whatever he may be said to be as fiar or proprietor. As to wood, the heir in possession cannot, for present profit to himself, dispose of future produce not accruing in his own time; but future produce of a different kind, in a sense, they say he may dispose of for rent payable in future, and grassum paid down. My Lords, I do not mean to say, that if the law has decidedly settled these things, we are, because of such observations, to disturb that, which is so settled; but the question is, whether the law has so settled it, and whether it has gone so far as to establish that a whole estate can be dealt with in the manner, in which the Duke of Queensberry has dealt with this, provided such a large question is open upon the pleadings: and at least we should have the collective opinions of those, who best understand the law of Scotland, the case being brought

before them in all the views of the case; and we should not decide without the best information we can receive from those, who can give that information, after we have ourselves stated in some degree the difficulties we feel upon the subject.

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My Lords, It is said that there has been a practice in the case of the King and Church as to taking grassums, and I agree there has been, when the practice can hardly be said to have been according to law. There has been a constant struggle between the persons holding crown lands and church lands, and the Legislature both in England and Scotland, the Legislature interposing from time to time against the non-observance of law as to such property. It must be admitted, however, that grassums, in cases of such property, have received much countenance in the administration of law. How far that fact shall weigh in decision upon the powers of an heir of entail, or fix his obligations, is matter much to be considered.

About the year 1685, it will be found, I think, that the leasing in Scotland extended only to very short periods; with respect to grassums, when they were first taken by heirs of entail, we have not much information.—Under this entail, I apprehend, not for some years after it was made,—not before, I think, 1720;—and that the practice should grow into use in this and other entails, is not very marvellous, when you consider, that an heir of tailzie in possession lets the lands perhaps only for eight or nine years; when you again consider that, if any body thought proper, being lucky enough to know the terms, on which the lease was made,

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during the currency of it, to interpose, in that case the person who made the lease and the tenant together might purge the irritancy ; when you know that it very frequently happens that the persons succeeding as heirs of tailzie stand in a connection of affinity or obligation, which prevents their disturbing the acts of those in possession ; and when you see how this thing has crept on from time to time. But you must ask, on the other hand, if this be the law, how comes it it has not been acted upon in so many settled estates as there are in Scotland, with reference to which it has not been attempted ? Men have an inducement to take the last penny out of their estates, and how has it happened that this has not been universally done, or almost universally done ? Can you doubt after decision in favour of the leases in question, that it will be universally done, unless the Legislature interfere, if by law it can be universally done ? Nevertheless, we must take the law as we find it, be the consequences what they may.

My Lords, I will mention also the word “ *dis-
pone* ” to your Lordships here. It is very true, that in the entail of the Queensberry estate, the word “ *alienate* ” does not occur ; and the word “ *alienate* ” not occurring, it is urged, that the Wakefield case cannot be said in terms to be an authority, unless the word “ *dispone* ” has the same effect as the word “ *alienate* .”

It must be recollected, that in the case of *Macdowall*, the Second Division of the Court held, that the word “ *dispone* ” had not the same effect as the word “ *alienate* ,” which shows again what may be the consequence of our immediate decision in this case.

They have lately held in that case of Macdowall, July 9, 1817. that, because the prohibition was only against disposing, although this House might have said that, if the prohibition was against alienation, you could not let a lease for ninety-seven years, that does not extend to disposing; and, therefore, they there confirmed a lease for 300 years. I know, my Lords, that that was a decision made, when there was a very considerable division of opinion in the Court. It also appears, that in this case a distinction has been taken between the words "*dispone*" and "*alienate*;" whether the word "*dispone*" means the same as if the word was "*alienate*." It would be of the last importance that we should know what is the understanding of all the Scotch Judges as to the word "*dispone*;" because if these objections about grassums, and so on, should fail, it will be then to be considered, whether the positive clause as to leases affects the generic meaning, if I may so express it, of that word "*dispone*," and whether, because particular leases are prohibited, or particular leases permitted in a deed, in which there is a generic term, a generic prohibitory term, it shall or shall not have the effect of prohibiting leases, which would be bad *vi legis*, if not within the prohibitory clause; for instance, whether if this word "*dispone*" strikes at leases, as *alienate* does, it can be contended that, because certain leases are not permitted or prohibited by this entail, therefore this heir of entail is let loose from the ordinary prohibition, *vi legis*, of letting the mansion-house and the grounds around, the prohibition as to elusory rents, as to extravagant endurance, and so on.

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My Lords, If I were obliged to state to your Lordships, what, in my judgment, is the meaning of the word *dispone*, I could not express at present a doubt, that that word *dispone* does as effectually prevent leasing as the word *alienate*. I know *dispone* may refer to the particular thing called *disposition*, but when it is said you are not to *dispone in any manner of way*, does not that mean expressly to state, that the author of that deed conceives that there may be dispositions of different sorts?

When I look into the language of statutes passed before and at the time of the date of this entail; when I look into the language of writs and of writers, it appears to me to be clearly proved by the citations from statutes, and from writers, and from instruments, that an assignation or a tack is a disposition, in the language of the law of Scotland; this seems to me almost as clear as that I have the honour now to address your Lordships; at the same time knowing, as I do, and have had experience of the talents and abilities of the Judges of Scotland, I am not only bound, but disposed to believe, that I may be in some error upon this subject, which I should be glad to have corrected. If this is to depend upon the meaning of the word *dispone*, and the interpretation to be put upon that word, at present certainly I think the word "*dispone*" would as effectually bar long leases as the word "*alienate*."

My Lords, The result of the whole is, that I feel it due to myself, if I may take the liberty so to say, when called upon to discharge so important and so anxious a duty as my duty in this case is; I

think it due to your Lordships, recollecting the immense consequence which must attach upon your judicial act, whatever may be the nature of it; I think it due to the Judges of Scotland, whose decision we are called upon in this place to review, to the lieges of Scotland, whose laws we are to settle, not with all the advantages, which I wish we could have when called upon to decide on great interests in property; above all, having regard to what has been the habit of your Lordships in cases of great value as to Scotch estates and titles, I mean to call upon the Judges to consider and re-consider what they have stated. Upon all these considerations, I think it fit to advise your Lordships to remit the two Buccleuch cases to the Second Division of the Court of Session, calling upon that Court, in your remit, to attend to the fact, that the action of declarator at the instance of the Executors and Disponees in trust, is an action brought by them in their character *as such*; to consider what is the effect of the action being brought by them in their character *as such*, in the absence of so many tenants, regard being had to all the circumstances that are alleged in the defences, as circumstances of concert, and alleged as acts of fraud upon this entail; and calling upon them to settle what is the meaning of this word *dispose* in that entail; and generally, calling upon them to attend to all the circumstances which belong to that entail, as influencing their opinion upon that action. I have looked with great anxiety to the pleadings, in order to see how, in their decision upon that action of declarator, or in their proceedings with respect to two or three tenants, the Court

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can affect all the other tenants, unless they have agreed to be bound by the result of these proceedings; but upon that I am not able to form any satisfactory opinion. It will be necessary, however, to remit the action of Hyslop for further consideration; and, when we have the opinion of the Second Division of the Court of Session upon these remits, taking care to have the best consideration we can have, by calling upon the Court of the Second Division, in obedience to the statute, to call to their assistance the Judges of the First Division, that the Judges of the First and Second Division may together consider all the points, we shall then, I trust, have obtained such further information from the Court of Session, as will enable us, not only to dispose of the Buccleuch declarator and the case of Hyslop, but would enable us, if the other causes stood over, to determine them; and, if the pleadings are such as enable us to do so, to determine, with that information, the rights of *all persons*, whether parties before the Court or not.

My Lords, I feel, and I am sure I state my regret that it should be so with the utmost sincerity, that this tends in some measure to delay, in a case in which it is due to the feelings of all persons interested that there should be no delay; but I should hope and trust, that in a case of this nature, in which the Second Division of the Court of Session, I observe, have interposed, in order to avoid delay, to give their opinion in the manner they have, that the Court of Session, in both Divisions, would be pleased to take this matter into their consideration immediately in their next session. My Lords, if

they do that, I speak for myself, and I speak most sincerely for myself, I believe I should be able to give my opinion upon this great and complicated case, as soon as I could now satisfactorily do it; for, although I have, I can venture to assure your Lordships, spent every hour which I could devote to this purpose to the consideration of this case, there are difficulties belonging to the decision of it, which as yet, and I am not ashamed to confess it, I have not been able to overcome. If I were pressed at this moment to give my decision, I should give it according to my present judgment. But even if it were satisfactory, in that state of things, to others, it would not be satisfactory to myself, and I avow it; and therefore I follow the example of my predecessors, and advise your Lordships to remit these Buccleuch cases, that they may be considered by both Divisions, and that we may have all the information that can possibly be procured before we come to a final conclusion on questions of such vast importance.

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Lord Redesdale,—My Lords, attending to the circumstances which the Noble and Learned Lord has referred to, and to what he has said upon the subject of these causes, I will not at this late hour detain your Lordships long; nor should I have troubled you at all, if I had not understood that it was his wish, that, having attended the hearing of the appeals, I should generally state my sentiments upon them. I agree with the Noble and Learned Lord in the manner in which he proposes to dispose of these cases. I conceive it to be in conformity to the manner in which your Lordships would dispose

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of a case of the same description, if it arose in the courts in this country. For if a case had arisen in one of the courts in Westminster Hall, and had passed through the Court of King's Bench and the Exchequer Chamber, and had come here in the form of a writ of error, your Lordships would have had the judgment of all the courts upon the subject, and might also have had here the assistance of all the Judges to guide you in your decision; but as you cannot have the same assistance in a case from Scotland, and there are in the decisions of the two Divisions of the Court of Session points in which they appear to have differed in opinion, the only way which your Lordships have of obtaining that assistance which you would have in the case of an English cause, is that which the Noble Lord has proposed.

It would be improper for me to enter much at length into the cases at this moment; but it strikes my mind as most extraordinary, that those of the Judges of the Second Division of the Court of Session who have considered the terms in which the entail of the Queensberry estate is expressed, containing an express prohibition, "that the heirs of tailzie should not set tacks or rentals of the land for any longer space than the setter's life-time, or for nineteen years, and that without diminution of the rental, at least at the just avail for the time," should have put the construction which they have put upon these words; and that upon that construction they should have proceeded in the interlocutor which they have pronounced. The interlocutor indeed has the effect of declaring, that the late Duke of Queensberry had the power of granting all

the tacks in question, some of these tacks in question being certainly within the terms of the words of the express prohibition, and therefore not capable of being sustained, if that express prohibition does operate to prohibit tacks of any description ; and, therefore, I must presume, that in the extent of the judgment, the Court has determined, that the word “ dispone ” has not the effect of the word “ alienate : ” and although the very words of the clause prohibiting tacks have been distinctly argued upon, considered and interpreted by the Court, and their decision seems to have been in a certain degree founded upon the construction which they have given to those words ; yet in the extent of their decision, they must have put that clause wholly out of their consideration, and considered that the word “ dispone ” not being equal to the word “ alienate,” therefore the long leases contained in the action of declarator are leases which may be sustained, because there is no prohibition to alienate.

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My Lords, With respect to the construction of the word “ dispone,” I must confess, as far as I can judge from the authorities stated in the printed cases, and in the argument at your Lordships’ Bar, I cannot have the least doubt, that the word “ dispone ” used in this entail, is not used in the limited sense which has been supposed to be attributable to it, but has been used in a general sense, superadded to the other words ; and that, according to all that I have found of authority in the law of Scotland, disposing is a word of extended effect, including alienation in a variety of ways in which property may be disposed of, and particularly in different acts of Par-

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liament clearly applying to leases of estate. I therefore think a prohibition to dispoſe muſt be at leaſt equivalent to a prohibition to alienate, and ſtrictly applicable to a leaſe.

My Lords, There are alſo particular parts of the deed of entail in queſtion, which ſeem to me to require a conſideration which has not perhaps been given (as far as we can judge from the accounts we have had of what paſſed in the courts below), by thoſe who have made the deciſions which are the ſubject of appeal. If the words "*without diminution of the rental*" are to be ſo reſtricted, as to mean without diminution of the nominal rental at the time of the leaſe granted, which appears to have been the conſtruction put upon thoſe words in the Court below, the conſequence as to the Queensberry eſtate will be this : That if the firſt perſon who ſucceeded to the entail, and thoſe who followed, had let conſtantly at the rent which was the reſerved rent at the time of the entail, and which is ſtated to have amounted to between 5 and 6000*l.* a-year at the time of the entail, granting leaſes continually from time to time at that rent, and taking graſſums, the effect at this time would be, that this eſtate not only would produce nothing to the heir of entail now in poſſeſſion, but would not produce any thing to answer either the charges in point of jointure which might have been made upon it, or the charges which, as provisions for younger children, might alſo have been made.

So, my Lords, with reſpect to the other eſtate, the Neidpath eſtate, the conſequence would have been exactly the ſame ; and the conſequence is very

striking with respect to one part of the powers given, that to make provisions for younger children; because the power in the entail of the Neidpath estate as to younger children, is to settle upon the younger children two years' net rent; whereas, according to the construction put upon the words "without diminution of the rental," in that entail, there might have been no net rent; and consequently the power of settling on younger children would amount to nothing; and the intent of the author of the entail, in this respect, might have been wholly defeated.

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To the deed of entail of the Neidpath estate, there is annexed a rental of the lands as they stood at the time; and to show what was the view which the persons who settled this estate had, the net rental is expressly noticed in the deed, and contrasted with the reserved rents; with an obligation, as your Lordships will recollect, that all the public burdens, of course including the teinds, shall be discharged by the person in possession from time to time; and he is bound to make that discharge, though, according to the construction put upon the words "without diminution of the rental," there might be no income whatsoever to be received by the person in possession equal to the payment of those public burdens.

The rental, speaking of the different estates, says, —*the sum of the whole*, that is, of the rents reserved in the leases of the particular estates, is so much. Then there is deducted for *teinds, and so on*, so much; then the net rent is stated at so much. The consequence is, that in that rental reserved

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The effect of what has been done with respect to the Queensberry estate, is unquestionably, as it *now* stands, to reduce the net rental to be received by the present possessor very considerably below the net rental received by the late Duke of Queensberry when he succeeded to the estate.

The construction put upon the words prohibiting leases in the Queensberry entail, appears to me very extraordinary. The qualifying words are, "without diminution of the rental, at the least at the just avail for the time;" and those words have

been interpreted as if they were disjoined by the word "*or*," as if the words "without diminution of the rental" were one complete sentence; and the words, "at the least at the just avail for the time," were another complete sentence, the one not connected with the other, and disjoined by the introduction of the word "*or*." There is nothing in the deed itself which imports that these words should be so disjoined, or the word "*or*," introduced; and I apprehend you must take all the words together; you must construe the words "*at the just avail for the time*," as words interpreting the words "*without diminution of the rental*," and as parts of the same sentence. And if you do so, it is impossible that the construction which has been put upon the whole by the Court of Session can be the just and true construction of the instrument. The clause must be considered either as of no avail, or it must be deemed to have prohibited some of the leases in question.

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I do not think it necessary to detain your Lordships with any further observations upon either of these cases, after the Noble and Learned Lord has made so full and accurate a statement of them. It appears to my mind, that it is highly important that the law upon the subject should be completely settled; not only with reference to the particular cases which are in question in these two entails, but that all persons who are in possession of entailed estates in Scotland, and those who may claim after them, should know what the law is upon the subject; and I believe it will be found, that, generally, the effect of a decision in a particular case is much

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more important, with a view to prevent future litigation and future questions between other parties, than with a view to the interests of the parties concerned in the particular case; that in all cases it is of more importance that the law upon the subject should be settled, known, and well understood, than what may be the effect of the decision as between the particular parties interested. I conceive the course proposed is highly proper, in order to enable your Lordships to come to a decision, which must, when you do come to it, operate in a certain degree as a legislative enactment, which cannot be altered without legislative enactment, as it may affect other cases. I entirely concur, therefore, in what has fallen from the Noble and Learned Lord. I do conceive, that what he has proposed is the only way in which your Lordships can with satisfaction come to that decision which it becomes your Lordships, in your character of Judges in the last resort, to come to upon so important a subject,—so important in the future administration of the law, and upon which there has been in the two Divisions of the Court of Session so much difference of opinion.

DUKE OF BUCCLEUCH v MONTGOMERY.

JUDGMENT,
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It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal; and in reviewing the same, the

said Court is to have especial regard to the fact, that this action of declarator is brought by the Executors and Trust-Disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish unconditionally all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner and under the circumstances mentioned in the pleadings, and is not instituted by any of the persons to whom such tacks are granted, nor are any of such persons parties thereto : And it is further ordered, That the said Court do reconsider the defences of the said appellant, and especially, Whether, in a question between such parties, the leases so granted, ought or ought not to be considered as granted in execution of such device, as is alleged in the said defences; and if so granted, Whether the same ought to be considered as granted in fraud of the entail, and are or are not such as ought on that account, or any other account appearing in the pleadings, to be held invalid, or not to be sustained at the instance of the pursuers, as representing the Duke : And in reviewing the interlocutor complained of, the said Court do particularly also reconsider what is the legal effect of the word "dispone," contained in the deed of tailzie of the 26th December, 1705, with reference to tacks of lands comprised in the said deed; and further do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed, which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases,

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July 10, 1817. and to all other the terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions, in reducing the amount of the clear rent receivable by the heir of tailzie, and to all the circumstances under which the appellant has alleged, and it shall appear, that the late Duke of Queensberry granted all such tacks: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

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DUKE OF BUCCLEUCH v. HYSLOP.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack, to which this cause relates, ought to be reduced, in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of in the cause between the Duke of Buccleuch and Sir James Montgomery and others, Executors and Trust-Disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court, in the

said cause, of even date herewith: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

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IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

KNATCHBULL and others—*Appellants*.

KISSANE and others—*Respondents*.

K. HOLDING certain premises under a lease made in 1769, for three lives at 300*l.* rent in 1802, obtains from G. tenant for life of the premises, with power of leasing at the best rent, then under age, and in embarrassed circumstances, by the offer of immediate payment of a year's rent then due, but by the custom of the country not payable till half a year after, and by a promise to plant on the premises 10,000 trees for the benefit of the landlord, and to make over to him those already planted, a new lease of the lands at the old rent, substituting instead of the two of the old lives, two young lives:—the lease, however, containing nothing about the trees planted, and no covenant to plant the 10,000 trees, but only an agreement endorsed on the lease to plant them. The old lease still retained by K. and no trees planted by him; but immediately after execution of the new lease of 1802, he assigns that lease upon trust to secure a provision for a wife whom he then marries; and soon

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1818.

FRAUD.—
CONSIDERA-
TION, &c.

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TION, &c.

after, by will, secures the provision upon other property, in case the lease should be evicted.—G. after he came of age, accepts the rent, and gives receipts for it. K. dies. Bill against his son, the widow, and her trustees, by G. and his trustees (the remainder-men not made parties) to have the new lease delivered up to be cancelled, as being fraudulent and void—and the bill dismissed below. But the decree *reversed* by the House of Lords declaring that the lease, as between the lessor and lessee, was such as ought to be cancelled, but remitting to the Court below to proceed, with respect to relief as against the widow and her trustees, as should be just.

Bill filed,
1807.

Old lease,
1769.

Title.

Power.

THE bill, filed in the Court of Chancery in Ireland, in 1807, stated that a lease of certain lands, in the county of Tipperary, was granted by one Mathew, the proprietor in fee, to William Kissane, in 1769, for the lives of the said William Kissane, and of Leonard Doharty and John Bray, and the survivor of them, at the annual rent of 900*l.* 5*s.* payable half yearly, that the lease was duly enrolled, and that Kissane continued in possession till his death, which happened in 1804.

The bill then stated a sale and conveyance of the lands in fee, in 1783, to George Goold, who, by will, dated 1787, devised the lands to his grandson, Henry Michael Goold, for life, remainder to his issue male in such proportions as he should, by deed or will, appoint; and for want of such appointment to the testator's eldest son, with remainders over: and with a power to the said Henry Michael Goold to lease for three lives, or thirty-one years, to commence in possession, at the most improved yearly rent and without fine. The tes-

tator died in 1789, H. M. Goold being then of the age of six years.

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The bill then stated that Henry Michael Goold had been very extravagant, and had contracted debts to a large amount at a very early period of life: that in 1802 he visited his estates in the county of Tipperary, and was then, while still under age, prevailed upon by Kissane to execute a new lease of the lands at the old rent, though the lands had trebled in value, substituting the life of Elizabeth Chadwick, then eighteen years of age, whom Kissane was about to marry, and the life of his son William Kissane, then of the age of sixteen years, instead of the lives of Doharty, who was then above sixty years of age, and of Bray, who was dead, though Goold was kept in ignorance of that fact; the inducement held out by Kissane, being a promise to pay immediately a year's rent, which was then due, but, by the custom of the country, not payable till half a year after; a promise to plant 10,000 trees, and to make over to Goold those already planted. That Goold executed the lease without perusing it, that he had nobody to advise him at the time, that he was ignorant of the value of the lands, that the lease did not contain any grant of the trees on the premises, and that, in point of fact, there were none on the premises; that Kissane did not deliver up the old lease, alleging that it was then in Dublin, and that he did not pay the year's rent immediately, but only gave a bill of exchange for it payable forty-one days after date.

FRAUD.—
CONSIDERATION, &c.

New lease, 1802.

The bill further stated that, the lease having

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FRAUD.—
CONSIDERA-
TION, &c.

Marriage
settlement.
Will.

been executed on the 2d October, 1802, Kissane, in the same month and year, being then seventy years of age, on his marriage with the said Elizabeth Chadwick, by indentures of settlement assigned the lands upon trust to secure a provision or jointure of 250*l.* a-year to the said Elizabeth, and by will, dated March, 1804, he devised and bequeathed all his property real and personal upon the trusts therein mentioned, charging the jointure on other lands, in case the said demised lands should be insufficient for the payment of it, and he directed his trustees to raise certain sums of money to make a provision for his wife in case the lease should be set aside. Kissane died soon after. The bill further stated that Goold having attained his age of twenty-one years in 1803, and, continuing to be embarrassed in his circumstances, in 1804, conveyed his estates to trustees, who, along with him, filed the bill against the representatives of Kissane, and those interested under his will, praying that the lease of October, 1802, might be declared fraudulent and void, and might be cancelled, or, if necessary, that the same might be reconveyed; and, that Elizabeth Chadwick and her trustees, if ignorant of the fraud, might be indemnified out of the other property of Kissane in respect of her marriage portion, and that an account, if necessary, might be taken of the personal estate of Kissane, &c.

Prayer.

Answers.

In the answers it was insisted that the new lease was obtained without fraud on the part of Kissane, who was then only sixty-three years of age, and not seventy, as alleged in the bill, in consideration

of the undertaking, endorsed on the lease, to plant 10,000 trees for the use of Goold, which he would have done, had he not discovered that Goold had practised a fraud on him, by representing that he had power to make the lease, and that he was of age at the time; and that this was the reason for making a provision for the wife, by way of caution, in case the lease should be set aside; that both Doharty and Bray were living, and in good health, at the time of putting in the answers; and Elizabeth Chadwick and her trustees alleged that they were purchasers for valuable consideration without notice. It was admitted that the lands were worth about 600*l.* a-year, and that no trees had been planted.

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Evidence was given on the part of the Plaintiffs (Appellants), that Goold, at the time of executing the lease, was under age; that the lands, on a lease for three lives, were worth, in 1802, from 600*l.* to 900*l.* a-year. A witness who was present at the execution of the lease, deposed that nothing was then said as to Goold's age; that Goold was greatly embarrassed in his circumstances when the new lease was executed, and that Kissane knew it; that the lease was produced by Kissane ready for execution, at the time of the agreement with Goold; and that Kissane alleged, as a reason for not delivering up the old lease, that it was then in Dublin, and that, in fact, it was not delivered up.

The Defendants produced Bray and Doharty as witnesses, who said they were in good health in 1802, and were, at the time of their examination, of the respective ages of fifty and forty-seven years.

Evidence.

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Bill dismissed
below, 1814.
Appeal.

One witness deposed that Goold represented himself as of age previous to October, 1802, and several receipts for rent paid to Goold and his receiver for the premises subsequent to 1802, and the lease of 1802, and endorsement thereon, by which Kissane agreed to plant the 10,000 trees, were proved.

The cause having been heard on the 11th July, 1814, the Court below dismissed the bill with costs, and from this decree the Plaintiffs appealed.

Sir S. Romilly and Mr. Roupell (for Appellants). The lease of the 2d October, 1802, was obtained from the Appellant, Henry M. Goold, fraudulently, by misrepresentation and concealment, and without consideration. The fraud is evidenced by the transactions themselves. The Appellant was a very young man, not even of age, inexperienced in matters of business, ignorant of the value of land, and who had, by his extravagance, involved himself in debt, and was raising money by the most improvident means. This was known to Kissane, who was a very old proprietor and occupier of land in that part of Ireland, and well acquainted with the value of land there. The bargain was made by Kissane with the Appellant, Henry M. Goold, himself then a minor, and who had no professional or other assistance.—The lease of 1769, which was then subsisting, was held on two lives, both of which were persons far advanced in years, and for which two lives were substituted, the lives of two young and healthy persons; this advantage

too was obtained by Kissane, without any consideration whatever paid or given by him to the Appellant, for the rent reserved by the new lease was the sum of 300*l.* 5*s.* and no more, being the same rent as had been reserved thirty-three years before, by the old lease, and which was grossly inadequate, in point of value, as land in the county of Tipperary had, in the year 1802, when the new lease was granted, risen in value to three times the amount of what it was in the year 1769, when the old lease was granted; the only colour or pretence of consideration was, that Kissane should plant 10,000 trees on the said premises, and assign them to the Appellant, but which it is admitted he did not do, and that he should assign such trees as he had then already planted; it appears, however, that no trees had then been planted, and it is, therefore, obvious that Kissane had deceived the Appellant, Henry M. Goold, by falsely representing to him that he, Kissane, had planted trees on the said demised premises, which were to be so assigned. The inducement which the Appellant had, and the temptation held out to him by Kissane, to agree to such new lease, was the promise of immediate payment of a sum of money, for a year's rent, which the Appellant was entitled to at the time, but which, notwithstanding such promise, was not paid in money, but by a bill of exchange at a long date; and the Appellant, Henry M. Goold, has not confirmed the lease of 1802, since he came of age; and the only remedy which the Appellant had, was in a court of equity; for the old lease was not delivered up, nor were the lives extinct, and it

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might have been set up as a bar to the trial of the validity of the second lease, at law.

He who afterwards received the rents for Goold was present at the execution of the lease, but he was, at that time, neither agent nor receiver, but a mere stranger. Then it may be said if the lease is void you need not the aid of equity. But it is quite common for equity to interfere to compel the delivering up of deeds invalid at law—*Underhill v. Horwood*, 10 Ves. 209—*Bromley v. Holland*, 7 Ves. 3; and the reason is, that they may not remain with those who can make no legal use of them, and continue a cloud on the title.

Mr. Wetherel and *Mr. Wingfield* (for Respondents).—The bill was defective for want of parties, the remainder-men who had an interest in the subject not being before the Court. The bill too did not offer to replace the interest under the old lease; and these defects might be relied on as grounds for dismissing the bill, in case the decree could not be supported on the principle about to be stated.

1st. With respect to Goold, no deception is here charged; and direct fraud being absent, supposing him to have been under age, the lease is not void but voidable, as in *Zouch v. Parsons*, 3 Burr. 1794; and the lease was confirmed by him, by his acceptance of rent under it after he was of age. The rule is the same in equity as at law. Here it is clear, that rent was accepted by him three or four years after he came of age. Suppose, then, that fraud is absent, though the landlord may, from

folly or improvidence, have let his lands at half the rent which they are worth; and if, though under age at the time, be after he becomes of age, confirms the transaction, the lease is good.

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2d. Then, with respect to the remainder-men, they say, that it is unnecessary to make them parties, because the lease cannot bind the remainder-men, as the lands are not let at the best rent. But if the lease is valid as against the tenant for life, the objection to it is premature. The title of the remainder-men has not accrued, and they are not parties: and equity never acts by anticipation. This is said to have been the ground of the decision below. Equity will not cancel the lease by anticipation, and *non constat*, but the *cestui que vies* may be dead before the title of the remainder-men accrues. The delivering up the instrument, lest it should be a cloud on the title, does not here apply; for the lease is not void with respect to Goold.

Suppose the lives in the old lease were dead, the remainder-men might have an interest to contend that the new lease was a good one, and were necessary parties. It is common to order deeds to be delivered up to be cancelled; but we are not litigating that point generally, but whether, under the peculiar circumstances of this case, the lease ought to be delivered up, and *Bromley v. Holland*, 7 Ves. 3. is no authority in this case. It was said to be essential, if bad as to the remainder-men, that it should be challenged by Goold.—Why? It is merely a question of time. If he was a minor at the time, the lease is only voidable, and he con-

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firmed it by clear acts. The rent must have been received, not under the old, but under the new lease; for he was a party to the new lease, and could receive the rent in no other way or character without an express reservation. The consideration is the planting of 10,000 trees, and there is a covenant, or at least an agreement, that Kissane would plant them. It is observable, too, that the receiver was present at the execution of the lease, and that there were laches in filing the bill. It appears, from the evidence of Mr. Humphries, a very skilful English attorney, that he was sent to Ireland, in 1803, to investigate the state of Mr. Goold's affairs, by the trustees afterwards appointed by Goold by the deed of 1804, one of whom died before 1807. The bill however is not filed till 1807. But if there had been no laches, and the bill had been filed before the death of the other trustee, then evidence might have been given of consideration in money, services, &c. which did not appear on the face of the deed, for parole evidence, collateral to, but not contradicting the deed, might be given.

They cannot succeed unless they establish gross misrepresentation. But there is no such thing; and there are repeated acts of confirmation.

Lord Eldon (C). There is no want of parties here; for the lease is void at law as to the remainder-men, because it is a bad execution of the power, which requires that the most improved rent should be reserved.

Sir S. Romilly (in reply). They say there is no

fraud; but I do not know what fraud is, unless taking advantage of the folly and improvidence of a youth under age, and getting from him a lease at a rent of 300*l.* a-year for lands which were worth 900*l.* a-year, without consideration, without coming under any obligation, is fraud. But if it were necessary to show direct actual fraud, that is proved by the promise to plant 10,000 trees, a mere pretended consideration, which was not introduced as an obligation in the lease; and for the performance of which promise there was no security, except the memorandum on the back of the lease. As to the confirmation, suppose he had confirmed the lease, though it would then have been good at law, it would still remain subject to be set aside in equity for fraudulent circumstances. Besides, the receipts were merely for rent, which might have been paid under the other lease, so that they were at least equivocal. As to the laches, the bill was filed as soon as the circumstances could be investigated; and then it should be remembered, that the two leases were retained. Kissane himself by his settlement showed, that he was aware that the new lease could not be supported.

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Lord Eldon (C). This is an appeal from a decree of the Court of Chancery in Ireland, and the Appellants represent that they filed their bill in that Court in May, 1807, stating that Thomas Mathew being seized in fee simple of the towns and lands of Knockballymaloe and Kilross, in the county of Tipperary, he, in July, 1769, granted a lease thereof to William Kissane now deceased;

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Title not dis-
puted.

the said premises containing about 332 acres of land, plantation measure, to hold unto the said William Kissane, his heirs and assigns, for his (Kissane's) own life, and the lives of Leonard Doharty and John Bray, and the life of the survivor of them, at the annual rent of 300*l.* 5*s.* payable half yearly: and that the indenture of lease was duly enrolled, and that William Kissane entered into possession of the premises, and continued in the possession thereof until his death, which happened in the year 1804. And further stating, that John Bray, one of the lives, was dead; that Leonard Doharty was living; and that the said Thomas Mathew was dead; and that Francis Mathew, his eldest son and heir at law, in the month of June, 1782, sold and conveyed the said premises to John Carrol, in trust for Michael Aylmer, Esq. who, in the month of February, 1783, sold and conveyed the inheritance of the said premises to George Goold, deceased, in fee; and that the said George Goold, deceased, by his will duly attested, made in the month of June, 1787, devised the said estate and premises unto the Appellant, Henry Michael Goold, for and during the term of his natural life, and after his decease to go and belong to his issue male, in such shares and proportions as he should, by deed or will, appoint; and for want of such appointment, then to his eldest son, with divers remainders over: and the testator, by his said will, empowered the Appellant, Henry Michael Goold, to grant leases of the said estates for three lives or thirty-one years, to commence in possession, at the most improved yearly

rent and without fine. And further stating, the death of the said George Goold in the month of March, 1789, when the Appellant, Henry Michael Goold, was of the age of six years or thereabouts; and that the said Appellant's guardian received the rent of the premises from the said William Kissane, until the time after mentioned.

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I observe here, before proceeding further with the statement, that the reasoning and the objection, founded on the want of the remainder-men as parties, cannot be sustained; as the lease from Goold to Kissane is clearly proved not to have been let at the most improved rent, and therefore is and must be void as against the remainder-men if they choose to quarrel with it.

Remainder-
men not
necessary par-
ties.

And further stating, that the Appellant H. M. Goold had been very extravagant, and had contracted debts to a large amount at a very early period of his life,—which was very probably the case, he being like many young men, who, being extravagant and in debt, are reduced to difficulties, and led by their embarrassments into improvident contracts: and then they complain that they have been imposed upon, and sometimes take as much advantage of others, as they say others have taken of them.

And further stating, that Goold being, in the year 1802, in the county of Tipperary, the said William Kissane, who was then far advanced in years; I pass over the other allegations that he was crafty, and so on—and skilled in the value of lands, and ready to take advantage of a young man, formed a design to impose on the Appellant, Henry Michael Goold, who was thoughtless and inconsiderate, to

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obtain from him a renewal of his interest in the said land; and that accordingly the said William Kissane, who owed the Appellant, Henry Michael Goold, a year's rent, and which, by the custom prevailing in that part of the country, the Appellant imagined was not to be paid until another half year's rent became due, some time in the month of October, 1802, requested the Appellant, Henry Michael Goold, to substitute the life of Elizabeth Chadwick, a young lady of the age of eighteen years or thereabouts, with whom the said William Kissane was then about to marry, in the room of one of the original lives in the lease of July, 1769: and that to induce the said Appellant, Henry Michael Goold, to comply with such request, the said William Kissane promised to pay the Appellant, Henry Michael Goold, the year's rent then due without the customary allowance of time (and the offer of ready money usually meets with a ready acceptance); and he further promised to plant 10,000 trees, and to make over to the Appellant those which had been already planted; and that so great was the folly and indiscretion of the Appellant, Henry Michael Goold, and such his want of ready money, that although the said lands had then trebled in their value, as the said Appellant has since discovered, since the year 1769, and although the said John Bray, one of the lives in the said lease, was dead, but of which the Appellant was then ignorant, and was assured to the contrary by the said William Kissane, and although the said Leonard Doharty was above sixty years of age, and the said William Kissane himself above seventy, the Appellant, Henry

Michael Goold, agreed to substitute the life of the said Elizabeth Chadwick in the room of the said John Bray; and that thereupon the said William Kissane produced a parchment writing to the Appellant, Henry Michael Goold, who had not then attained his age of twenty-one years, and who had no person to advise him, and was ignorant of the value of the said lands, and the said Appellant executed the same, and the said William Kissane executed a counterpart, which is dated the 2d of October, 1802.

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Your Lordships will permit me to notice, that the matter, stated by way of allegation in a bill is not always true; but often the mere coinage of the imagination of the drawer of the bill; and as to the alleged death of Bray, if he was the same Bray who was examined as witness, he must have been alive: and he says, in his evidence, that instead of being dead in 1802, he was then alive, and in good health—"and is now of a good healthy constitution; and is now about the age of fifty years." And Leonard Doharty, who was stated to have been in 1802 above the age of sixty years, says, that instead of having been then above the age of sixty, "he was in a right good state of health and constitution in the month of October, 1802; and is now of the same good state of health and constitution, and is now of the age of forty-six or forty-seven years."

I suppose it may be taken for granted, that these persons were the same mentioned in the bill; and though perhaps they somewhat under rated their ages, as we are all apt to do, yet alive they certainly

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were when they were examined as witnesses. To be sure, when you consider that they were named as. the *cestui que vies*, in 1769, and when you recollect the lapse of time from 1769 to the time at which they gave their evidence, you cannot help suspecting that they were a little more advanced than the full vigour of youth, or that Kissane must have had very great confidence in the strength and vigour of their constitution when they were little children ; and, that the vigour and strength which they had when they came into the world, would probably continue, and that they would live long.

However, we must take the representation to be correct for the purposes of this cause.

And further stating, that the Appellant's, Henry Michael Goold's, execution of the said parchment writing was procured from him by a fraudulent representation and suppression ; that the Appellant never read the said parchment writing, and that the said William Kissane had, unknown to the said Appellant, caused the said lease to be filled up with his, the said William Kissane's own life, with that of the said Elizabeth Chadwick, and also with the life of the said William Kissane's son, who was then of the age of fourteen years or thereabouts ; and at the annual rent of 300*l.* 5*s.* being the same rent as had been reserved forty-six years before ; and that such new lease did not contain any grant of the trees then on the premises, but which had turned out to be immaterial, as the said William Kissane had not planted any thereon, and that the said William Kissane had kept the original lease in his possession,—alleging that the

same was in Dublin, and that the said William Kissane kept the said original lease in his possession to protect himself and his representatives at law, in the possession of the said premises. And further stating, that the said William Kissane did not pay to the Appellant Henry Michael Goold the rent which was then due, but gave the said Appellant a bill of exchange, payable forty-one days after date, and which was not paid until a considerable time after the same became due.

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TION, &c.

Your Lordships then see how the case stands. Young Goold goes to Ireland in 1802, and grants this lease in the way which has been stated. Whether he was then embarrassed and involved in debt or not, he seems to have been, at least, so much in want of ready money, that it was material to him to have a year's rent paid down, instead of waiting for the usual time of payment, according to the custom of the country. And accordingly a bill of exchange, payable in December, 1802, was drawn; and on looking at the original bill you find a writing on the front of it, which they call an endorsement. That is not usually the manner here, where generally an endorsement is made on the back, and not on the face of the bill. Kissane was then in possession under the old lease held for these lives, in the full vigour of their youth and constitution; and when the new lease was made, therefore, if this had been perfectly fair on all sides, the new lease would be granted in consideration of the surrender of the old lease. But, as one has heard of on other occasions, it was thought safest to have two strings to the bow: and

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it so happend, that he had left the old lease in Dublin : and he kept both in his possession since 1802 : so that one finds it difficult to say, that the surrender of the old lease was part of the consideration for the grant of the new lease. The rent was the same as that which was reserved in 1769 ; and the lessor had then no right to bind the inheritance, except by a lease in possession, and at the best rent that could be got, and that was nearly double the old rent. They said that it was true, that as against the remainder-men it was not good ; but that it was good as against Goold. But then recollect that he covenants that it was valid as against the inheritance, and that he bound himself to make good the value in case the lease should be evicted.

The old gentleman, although we must not say that he was so crafty as he was represented in these papers to be, was, at least, very provident, for the next week after the execution of the lease he settled it on the lady whom he married. It does not appear that they made any provision as to the issue ; and it so turned out, as might have been expected, that there was no issue of that marriage.

Then after the settlement on the lady, he seems to have been casting his eye back upon the transaction, with respect to the execution of the lease, and to have had some doubts whether they were not such as rendered its validity rather questionable ; perhaps, as it has been represented, because Goold had not told him that he was only tenant for life, with a power of leasing at the best rent. But however that was, he, in his will, devises all his

estates real and personal, in trust for the benefit of his children born before his marriage with this lady. And then the bill states, that the said William Kissane, after reciting in his said will that since his marriage it had been apprehended that the lease by virtue of which he held the lands might be evicted, and might therefore not be considered a sufficient security for the provision which he had made for this lady; therefore, in order the better to secure a provision for his said wife, in case the lease should be evicted or determined, he ordered and directed his trustees to raise certain sums of money for that purpose.

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TION, &c.

The way in which Knatchbull and the other Appellants became interested was by a trust deed from Goold.

The bill charges that the lease was made at a gross under value, and that it was proved that the premises were worth a great deal more rent; that Goold had never been in Ireland before, and was unacquainted with the value of the property; although it is admitted that Cooke, who was afterwards his receiver, was present at the execution of the lease. And, on the whole matter, the bill prayed that the lease might be set aside, without offering the conditions which Kissane would be entitled in equity to have annexed to that determination.

We called for the original lease. I do not know whether timber is of any value in the county of Tipperary, but Kissane agrees to plant 10,000 trees, which were to be suffered to grow for the benefit of the landlord. The lease, however, was drawn

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in such a hurry, that this little *policy*, as we would call it in the north of England, was forgot: except that there was a little endorsement respecting it on the back of the lease. I do not call that a covenant; for unluckily it would not do as an English covenant, not being under seal; and it could at most only amount to a parol agreement, on which perhaps an action might be brought.

The Lord Chancellor of Ireland was of opinion, and I beg to be understood as never speaking of his opinions but with the greatest respect, that the bill should be dismissed, leaving matters as they were before. Now it is impossible that it could be right simply to dismiss the bill, because, if the lease of 1802 was valid, the decree ought to have directed the old lease to be delivered up: and if that had been objected to, because the remainder-men were not parties, and they might be interested to set aside the new lease; or because Kissane did not know that Goold was only tenant for life; still such an arrangement might have been made as would have protected Kissane in the possession to the extent of the interest under the old lease, as far as Goold could have protected him; so that it was impossible it could be right as it stood.

Fraud.

Then another question is whether, without using the word *fraud*, which is often misunderstood when lawyers use it, this is a lease that can be sustained. It was contended by my learned friend at the bar (Mr. Wetherel) that there was not sufficient charge of fraud to get rid of the lease on that ground. But I think he will agree with me that if there is that in the bill which, in

construction of law, amounts to a fraud, in the legal sense of that term, it is not necessary that the plaintiff should apply that term to it in the bill.

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Want of con-
sideration.

Now, attending to the absolute want of consideration in this case, equity cannot but feel a strong disposition to set aside the lease. He has a lease for his own life, and those of Doharty and Bray; and however stout these might be, they were less valuable lives than the life of this lady, eighteen years of age, and of Kissane's son, fourteen or sixteen years of age, which were the lives substituted in the lease of 1802. And how can it be contended that the substituting, for a lease for three old lives, a lease for one old life and two young ones, at the same rent, when the lands were worth double the old rent, was a transaction in which valuable consideration was given by Kissane? And then Goold covenants absolutely for the validity of the lease; and, though he got nothing, he was liable for the value with his purse, and even with his person if he could not pay: and further, the old lease remains in the hands of the lessee as a shield; I do not say it was intended as a fraud; but there is enough to show that Kissane was anxious, in case Goold had quarrelled with the new lease, to have the old lease to set up against him. And when you consider the temptation of an immediate sum of money held out to a young man greatly in want of ready money; and then the notion of wood being given to him, of which there was not a stick on the property; and that you do not find inserted in the lease what was agreed upon as to the planting of trees; it does appear to me

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that this is a lease without consideration, giving value for nothing: and from these and the other circumstances, I cannot agree that this bill should be dismissed generally, or that the lease of 1802 is a subsisting lease at all.

I am always afraid, when dealing with these Irish cases, that I may overlook some peculiarity in the mode of proceeding in that country. But I am authorized to say, that this case has been considered by a Noble and Learned Lord well acquainted with the Irish practice, and that he concurs with me in this opinion. But if we order the lease of 1802 to be delivered up, we must take care that justice is done, and that the enjoyment shall continue under the old lease, and that Kissane's representatives should be relieved from the obligations of the new lease.

Alleged acts
of confirma-
tion.

I do not rest much upon the alleged acts of confirmation in receiving the rent. If the old lease had been delivered up, they would have been much more material. And without entering into the question about leaving a cloud on the title, the circumstance of Kissane's having the old lease in his possession is one which establishes the jurisdiction; for, whether he was an infant at the time of executing the lease, and afterwards confirmed it, if it was in his power to confirm, or an adult, he could never have gone to law; for they would have pulled out the old lease, and have said—we hold by this title.

Lease void
as between
Kissane and
Goold.

Then what I propose is, that the lease of 1802 be declared void as between Kissane and Goold, without prejudice to the old lease.

Then there is another point, as to which I wish to know, whether the parties desire that there should be any further proceeding. Kissane seems to have thought that his chance for the lady would be increased if he got the new lease: he weds the lease, and then, *eo instanti*, he marries Miss Chadwick, and settles it on the wife. Now whether the lease is bad, as against Kissane, and whether it is bad as against her, a purchaser for the most meritorious consideration, that of marriage, are different questions: and though this point did not require attention in the previous state of the proceedings, it may be material now.

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State of the
case as be-
tween the
wife and
Goold.

This is not much worth her agitating; but if she wishes to agitate that matter, as the Court has not considered this before, I apprehend the cause ought to be remitted with a declaration as to these points, and so calling the attention of the Court to the state of the case as between her and Goold. But if the lease is bad as between Kissane and Goold, it does not appear important for her to carry it further, regard being had to the provisions of the will and the equities of Goold.

The Judgment of the House, after the usual recitals, was in these terms:

“That the said decree complained of in the said
“appeal dismissing the Appellant’s bill with costs,
“be and the same is hereby reversed: and it is
“hereby declared that the lease of the 2d Oct.
“1802, prayed by the bill to be declared fraudulent
“and void and to be cancelled, is a lease which
“ought, as between the lessor and lessee, and those

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“ claiming under the lessee as volunteers, to be de-
“ livered up and cancelled: but it being repre-
“ sented to the Lords that the Court of Chancery
“ in Ireland, having dismissed the bill, did not pro-
“ ceed to take into consideration whether the relief
“ or any and what part of the relief prayed by the
“ bill, in case the lease was to be considered as in-
“ valid as between the lessor and lessee, and such
“ volunteers ought to be granted as against Eliza-
“ beth Chadwick, now Elizabeth Armstrong, and
“ her trustees, or any other points arising in the
“ said cause in such cases as aforesaid: it is there-
“ fore ordered that the cause be remitted back to
“ the Court of Chancery in Ireland to proceed
“ therein as may be just, and as is consistent with
“ this Judgment.”

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CAMPBELL AND ANOTHER—*Appellants.*
ANDERSON AND Co.—*Respondents.*

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—IRREGULA-
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DECREET in October, 1807, by justices of peace against Anderson and Co. tanners, finding them liable in a penalty, and condemning stock on their premises seized in August or September, 1807, by an excise officer, made without evidence, on complaint of a collector of excise that Anderson and Co. carried on the trade of curriers as well as tanners at the same time, contrary to law. The goods sold under the decreet, and purchased up by Anderson and Co, who brought their action in

1809, in the Court of Session, against the excise officers, for reduction of the decret for reasons specified (the decreets being against Anderson and Co. not being one of the reasons specified), and other reasons, and for repetition of their money, and for damages. Preliminary defences founded on want of jurisdiction in the Court, because the decret rested on revenue statutes, on want of a month's previous notice to the officer, and on the alleged expiration of the time for bringing the action (three months), repelled: and interlocutor of the Lord Ordinary on the merits reducing the decret, and finding the pursuers entitled to repetition of their money, but assolzieing the defenders from the conclusion for damages. The interlocutor acquiesced in by the pursuers, who dropped their claim for damages, and the interlocutor adhered to by the Court. Difficulties in the Dom. Proc. because the summons contained a conclusion for damages, though not insisted upon after the Lord Ordinary's interlocutor; and because the reason that the decret was against Anderson and Co. was not specified in the summons, and question whether it could be taken advantage of under the words "*other reasons*:" but the judgment **AFFIRMED**.

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THIS was an action by Anderson and Co. tanners in Beith, in Ayrshire, against Iver Campbell, collector, and Archibald Douglas, supervisor of excise, to reduce a decret of justices, made on complaint of the collector, condemning the whole stock in the drying-sheds of the pursuers, consisting of uncurried skins, which had been seized by Douglas, the excise officer, on the alleged ground that the pursuers were in partnership with a currier in Beith, contrary to law; and for repetition of the money paid by the pursuers for their own skins when sold by roup under the decret; and also for damages.

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The complaint was founded on the statute 1 Jac. 1. cap. 22. sect. 6. which enacts—" that no person or persons using the mystery of tanning leather shall occupy or use the craft or mystery of a shoe-maker, currier, butcher, or of any other artificer, using or exercising the cutting or working of leather : " and on the statutes 9 Anne, cap. 11. and 24 Geo. 3. cap. 19. referring to the first mentioned act, and reciting—" the due execution whereof hath been and is of great importance to the public good and service of this realm, and will very much contribute to the ascertaining and collection of the duties by this act intended to be granted : " from which last words it was contended that the acts were all revenue statutes.

The decret proceeding merely on the statement of the complainer, without any evidence, was in these terms :—

Decreet.

" *At Saltcoats, the 5th of Oct. 1807 years.*
" Upon a complaint at the instance of Iver Campbell, Esq. collector of excise, to the Honourable his Majesty's Justices of the Peace for the county of Ayr, against *William Anderson and Company* in Beith, for exercising the trade of a tanner along with the trade of a currier, or other cutter of leather, contrary to law, and having in their possession 90 hides, 104 calf-skins, 52 hog-skins, and 5 sheep-skins, all seized by Archibald Douglas, supervisor of excise at Kilmarnock, the said justices, consisting of, &c. &c. having considered the above complaint, and the laws of excise made in that behalf, and having

" heard parties at full length, condemn the seizure
 " therein mentioned, as craved; and appointed the
 " tanned leather specified to be roupd and sold
 " for behoof of his Majesty and seizure-maker;
 " and decerned, and thereby decern, the said
 " William Anderson and Company in 3*l*. sterling,
 " to which, on account of favourable circumstances,
 " they mitigate the statutory penalty, and ordain
 " them to make payment thereof to the complainer,
 " together with the expense of recovery, if need-
 " ful; and further, ordain this their sentence to
 " be put into due and lawful execution by officers
 " of excise, constables of the peace, and decern."

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The seizure was made in the end of August, or Dates.
 beginning of September, 1807; and on the 6th
 October, 1807, the day after the date of the de-
 creet, the goods were sold under it, and purchased
 up by the pursuers for 120*l*. for which sum, with
 the 3*l*. penalty, they brought their action, as
 above-mentioned, in the Court of Session, in Jan.
 1809.

The defenders gave in preliminary defences, 23 Geo. 3 cap.
70. 28 Geo.
3. cap. 37.
 founded on certain statutes limiting actions against
 revenue officers, for matters done by them in that
 character, in certain cases, to three months, and
 requiring a month's notice to be given to the officer
 of the revenue before the action is brought. They
 further stated, as a preliminary defence, that the
 Court of Session had no jurisdiction in the matter.

The preliminary defences were repelled by Lord May 12, 1810.
 Woodhouslee, Ordinary, and by the Court.

The cause then came on to be heard on the 28th Feb. 8, 1811.
 Nov. 1812, before Lord Gillies, Ordinary, who pro-

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Lordordi-
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locutor, Nov.
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nounced the following interlocutor :—" sustains the
" reasons of reduction, reduces, decerns, and declares,
" conform to the conclusions libelled: finds the
" defenders also liable to the pursuers in repetition
" of the sum of 123*l*. sterling, libelled as having
" been illegally extorted from them by the de-
" fenders, and interest thereof from 11th Nov.
" 1807, until payment, and decerns: assoilzies the
" defenders from the claim of damages concluded
" for, and decerns: but finds them liable to the
" pursuers in expenses," &c.

The pursuers acquiesced in this interlocutor, and, in the subsequent proceedings before the Court, claimed only the money extorted from them, and the reduction of the decret. The Court, on advising a petition and answers, adhered to the Lord Ordinary's interlocutor; and, afterwards, on a second petition, and after having directed the argument to be stated in memorials, they adhered to their former judgment. From this judgment the defenders appealed.

Judgment of
the Court,
June 14,
1814.

The following cases, respecting the jurisdiction of the Court of Session, with reference to revenue questions, decided before and since the Union, were stated in the printed case for the Respondents:

Cases decided before the Union:—*Keith against Murray*, 10th Dec. 1675—*The Tacksmen of the Impost of Edinburgh against Young and Others*, 2d Feb. 1681—*Duke of Hamilton v. Laird of Clackmannan*, 14th Dec. 1665—*Lord Colville v. Feuars of Kinross*, 15th December, 1666—*Duke Hamilton v. Laird of Allardyne*, 6th Dec. 1667—*Stewart v. Aitchison*, 17th Jan. 1668—*Duke*

Hamilton v. Maxwell, 29th Feb. 1688—*Inglis v. Laird of Balfour*, 25th June, 1668—*Collector General of Taxations v. the Director of the Chancery*, 22d Jan. 1669—*Collector of Taxes v. Masters and Servants of the Mint-house, codem die*. *Duke of Hamilton v. Feuars of the King's Property*, 14th July, 1660—*Pearson v. Town of Montrose*, 23d June, 1669.

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Since the Union, the following cases have been decided:—Case of *Wm. Reid*, 19th July, 1765, in which the matter of jurisdiction was particularly considered by the Court—competition between *Commissioners of Excise and Creditors of Earl of Northesk*, January, 1724 (Dictionary, vol. 1, p. 25, *voce* King). *Hamilton v. Legrand*, 4th Dec. 1733—*Ogilvie v. Wingate*, 1st Feb. 1791—*The Creditors of Burnet v. Murray and his Majesty's Advocate*, 7th July, 1754, affirmed in the House of Lords, on 24th Feb. 1755—*Locke v. Tweedie*, 3d Dec. 1703—*Robertson v. Jardine*, 6th July, 1802—also the case of *Guthrie v. Cowan*, 10th Dec. 1807.

Fac. Col. p.
41.

The Court of Session has an undoubted jurisdiction over justices of peace and other inferior courts, where they have exceeded their powers:—*Countess of Loudon v. Trustees of Ayrshire*, 28th May, 1793—*Patillo v. Maxwell*, 25th June, 1779.

Respondents'
3d answer.

Lord Advocate and Solicitor General (for the Appellants). 1st, Whether the Court of Session has jurisdiction.—2d, Whether the action ought not to have been brought within the three months limited by the statute.—3d, Whether a month's

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previous notice ought not to have been given to the officer.

1st, That depends on whether these are revenue statutes. If they are statutes merely for the regulation of trade, the Court of Session has jurisdiction. If they are revenue statutes, the Court of Exchequer alone has the jurisdiction by stat. 6 Anne cap. 25. The stat. 1 Jac. 1. cap. 22. if originally intended for the mere regulation of the trade, was made a revenue stat. by the act of 9 Anne, cap. 11; and the stat. 24 Geo. 3. cap. 19. declared that these extended to Scotland. They did so extend by the act of Union; but doubts had been entertained; the purpose of removing the doubts was the better collection of the revenue, so that this was equal to a positive declaration that these were revenue statutes. The Court of Exchequer was instituted by the 6th of Anne, cap. 26. which enacts, "that all and every the revenues and duties, &c. and all informations, actions, &c. touching or concerning the before-mentioned matters; and all prosecutions, remedies, and accounts, for or concerning the same, &c. shall be within the jurisdiction and authority of the said Court of Exchequer in Scotland, and hereby are *annexed* to the said Court." There is no statute giving any such jurisdiction to the Court of Session, and the only alteration has been with respect to the powers given to the justices. The cases of *Ramsay v. Adderton*, Kilk. 308; and *Duke of Queensberry v. Officers of State*, Fac. Coll. Dec. 15, 1807, were decided upon this view of the jurisdiction. (*Lord Eldon*, C. The question in this country in

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such a case would be, not whether the Court of King's Bench could try whether the penalty had been incurred, but whether it might not say that the decret of the justices was bad on the face of it.) There was nothing in the summons respecting the irregularity, and no such question was argued, except that it was said that the justices had proceeded without evidence; and if so, the party had his remedy by appeal to the Quarter Sessions, or the Exchequer. But here he calls on the Court of Session to decide, not on the irregularity, but on the merits: and the Court, having sustained its own competency, then reduced the decret on the merits, and not on the form.—2dly, If these were revenue statutes, the action should have been brought within three months. This is made necessary by the statute 28 Geo. 3. cap. 37. which extends to Scotland, as was held by the Court of Session in *Grant v. Harper*, Feb. 1810. But fifteen months elapsed before the commencement of this action.—3dly, The pursuers did not give the month's previous notice required by the statutes to be given to the officer, if the act, whether wrong, or beyond his duty or not, was done in his character of excise officer. This was done in his character of excise-man.

With respect to the argument that the statutes did not extend to Scotland, because the proceedings there mentioned were unknown in Scotland, the case of *Surtees v. Allan*, decided in this House, was an answer. This personal action is a nullity, because the money was paid into the Exchequer

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28 Geo. 3.
cap. 70.
28 Geo. 3.
cap. 37.

Surtees v. Allan, ante.
2 vol. 254.

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27 Geo. 3.
cap. s. 36.
43 Geo. 3.
cap. 2.
28 Geo. 3.
cap. 27.
23 Geo. 3.
cap. 70. s. 30.

before it was brought, *Scott v. Shearman*, 2 Black. 977.

The Court of Session may quash the order where the question is whether it is a revenue case or not; but it is clear that these are revenue statutes, and the language of the Court in *Ramsay v. Adderton*, and *Duke of Queensberry v. Officers of State*, might be quoted against their own judgment in this case. Supposing these to be revenue statutes, the action was clearly precluded by lapse of time and want of notice. The officer had no control over the justices; and he would be in a very hard situation if this personal action could be sustained against him while the decree was in force, and no sufficient ground to reduce it had been laid in their summons.

Sir S. Romilly and *Mr. Warren* (for the Respondents). This was merely an action to recover money, taken from the Respondents without lawful warrant, and therefore received to their use. And it is unnecessary to enter into the question, whether these were or were not revenue statutes; for, admitting all this, yet the decret being a nullity, they paid the money in their own wrong, and had a right to recover it. They say there is good ground in our summons to reduce the decret. But we did not know what the decret was. They refused to show it; and all we knew was, that under colour of some decree, they seized our property. The single question is whether our money has not been taken from us without any authority

at all: and, even if these statutes do extend to Scotland, the limitation and notice do not apply to actions for the recovery of the money, but to actions of trespass or *tort*; *Wallace v. Smith*, 5 East. 115. 122; and the reason for the notice is stated to be, that the officer may have an opportunity to tender amends. The summons originally was for production of the decret, repetition of the money, and damages. It was dismissed as to the damages by Lord Gillies. We submitted, and it stands as if there had been no claim for damages in the summons which relieves us from the obligation of notice. The decret could not be sustained as it was against *Anderson and Co.* This was decided in England in *Rex v. Harrison and Co.* 8 T. R. 508. and there Lord Kenyon said that the Court was bound in duty to take care that these summary convictions were regular, whether the parties objected or not. How could they know on this conviction who was to pay the penalty? Of whom was it to be demanded? Who were *Anderson and Co.*? There is no information in this decret. The penalty is *3l.* But it might be *3000l.* There are at least as many defects as lines in it. But it will be sufficient to mention one or two. The evidence is not mentioned; and the decret being subject to appeal, how is the Court of Appeal to judge of it? According to their own books, this is a decisive objection. A complaint was laid before them, and what is the substance of the information received by them? Not a syllable appears. The seizure maker is Archibald Douglas, and, having heard him, they condemn the leather to be roused

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Irving v. Wilson, 4 T. R. 485.

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and sold for behoof of his Majesty and the *seizure-maker*, he being the only witness. Interest was an objection to a witness even here, much more in Scotland. In the English law the cases required that the name of the witness should be set out, that it might be seen that the penalty was not given to the witness. But here it is stated that it is so given. Then it does not appear that the examination was on oath. There must be some form of proceeding by which they are bound in Scotland, though there may not be the same strictness as here. The decret should also set forth the description of stock, that it might be seen that it was illegal stock. All these are fatal objections, and the conviction is a nullity, and we are entitled to a repetition of our money.—(*Lord Eldon, C.* This action is originally brought mixing *assumpsit* and *tort*. If the proceeding had been here, if you said a word about *tort*, you must have given notice. Can you, by slipping in a count for money had and received, get rid of that? Then, if this is *assumpsit* for 123*l.* the question arises whether the payment was, or was not voluntary. If you brought your action for damages, after getting rid of the conviction, it must be within three months.) If it had been for damages alone, that would be the case, but the claim for damages has here ceased, and the action is for recovery of our money. (*Lord Eldon, C.* It was originally for more, and the demand is reduced by sentence; and the point they argue is, that as it was brought originally for more than the money paid, you should have given a month's notice.) Our memorial below stated that all we

claimed was a repetition of our money. They rely on stat. 28 Geo. 3. cap. 37. But that could apply only if the action were brought in the Exchequer, which had jurisdiction, but not exclusively. All the terms of it were applicable to a court where the trial must be by jury. It never could apply to proceedings in the Court of Session. If the action had been brought in the Exchequer, they would have had the advantage of the statute. But it is brought in the Court of Session, to whose proceedings the statute cannot apply. (*Lord Eldon, C.* You bring your action fifteen months after the seizure, upon this state of facts. They purchased their own goods; and I do not find that you then questioned their right to retain the money; and the money is paid into his Majesty's Exchequer. Can you then, in an action against the individual who made the seizure, recover that money which, before he had notice of your purpose, he paid into the Exchequer? It has been decided in this country that the courts are to take notice of the time when the officer is called upon to pay the money into the Exchequer.) He paid it in his own wrong. (*Lord Eldon, C.* He could not help paying it.) They protested, and he might have stated that circumstance, and that it was alleged that the seizure and conviction were illegal. The delay was in consequence of applications to the Excise Office to settle the matter. The next objection was, that we ought to have appealed to the Quarter Sessions. But it has been decided in Scotland that the jurisdiction of the superior court is not taken away, unless by express words, or neces-

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sary implication; *Guthrie v. Cowan*, Fac. Coll. 1807; and also in England, *Rex v. Jukes*, 8 T. R. 542, 544—*Rex v. Sparrow*, 2 Bur. 1042.

1st, Then we say that this decret was a nullity.—

2d, That the statutes requiring notice and commencement of the action within three months cannot apply to a proceeding in the Court of Session.—

3dly, That the jurisdiction of the Court of Session cannot be taken away by general words. But there is another objection, that the action is exclusively triable in the Court of Exchequer. It is clear that the Court of Session has jurisdiction over the proceedings of magistrates, as the Court of King's Bench has here; and, if a decret is appealed from, though an excise officer is connected with it, the Court of Exchequer has no more power to remove the cause than the Court of Exchequer has here to remove a cause from King's Bench, where the question is whether the powers given to magistrates have been properly executed. And by stat. 6 Anne, cap. 26. the Court of Exchequer is put on the same footing as the Court of Exchequer here. Suppose then an action of trespass brought against an officer of excise in the King's Bench, or Common Pleas, it was never argued that the officer could plead that he was an excise officer, and not bound to answer. A special application must be made to the Court of Exchequer, which might, if they thought proper, remove the cause by a proceeding in the nature of an injunction; not that the Court of King's Bench could not entertain the cause at all, but that the officer has the privilege of being sued in the Exchequer. That is the principle; *Crispe v.*

Campbell, 1 Anst. 205. N. If it be the privilege of the officer, as Eyre, ch. B. there states it, the officer ought to apply for it. If he does not, he waives it. In this case they did not apply to the Exchequer, and waived the privilege; and there was one part of the case here so definitely belonging to the Court of Session, that the Court of Exchequer could not remove it: viz. the authority to quash or reduce the decret. (*Lord Eldon*, C. The summons claims two things, a repetition of the money, and damages. The Court has negatived the damages, and given you a repetition of the money and the whole of the expenses. You admit that the claim for damages cannot be supported; but then that demand occasioned almost all the other questions. But how could one part be removed, and not the other?) The Court of Session has clearly the jurisdiction over the principal matter, viz. whether the magistrates have properly executed their powers, and the incident follows the principal matter. (*Lord Eldon*, C. How could the whole have been removed?)

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Lord Advocate.—I cannot state any process for that purpose. If the Court of Exchequer were to issue an injunction, the consequence might be a general warrant to commit the Barons. The fact is, that the Exchequer has the exclusive jurisdiction in revenue matters; the Court of Session an exclusive jurisdiction in common questions; and the Court will consider whether it has jurisdiction without attending to any application by another

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court, and such an attempt to interfere was never made. The reduction, if the grounds were that these were not revenue statutes, that they had fallen into desuetude, &c. belonged exclusively to the Exchequer: and the question is, whether the ground was the irregularity of the decret, or that an excise officer had done wrong in that character. In the latter case the cause could be tried only in the Exchequer. With respect to the irregularity of the decret, it was sufficient to state that what they argued upon was a mere abstract which might be subsequently filled up; and, if the action had been properly brought, a full record would have been made up. This was clearly incompetent for defect of notice. They say, the claim for damages was abandoned, but then issue was joined on that, and the expenses, perhaps the whole of them, occasioned by it; for, if repetition alone had been demanded, *non constat* but the money would have been paid. They produced no authority for this form of proceeding in any case, and the principle was against it. As to the objection that the stat. 28 Geo. 3. cap. 37. did not extend to Scotland, or to actions in the Court of Session, because the terms applied only to courts which might proceed by jury trial, the case of *Grant v. Harper* was an answer to that, and that of *Surtees v. Allen*, decided in this house, after a most able argument by the Noble Lord who moved the judgment, had set the question at rest. The summons prayed to set aside the conviction, and for damages; and the laying it so was an admission, that till the conviction was reduced the pursuer

Surtees v.
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vol. 2. 254.

could not reclaim the money paid to his Majesty. (They say, that they did not know what the decret was till you told them.) They might have proceeded by petition or reduction. (*Lord Eldon, C.* One ground of complaint is, that the goods were sold without notice to them.) That is denied, and there is no evidence of it. The other party was entitled to a copy of the decret if he had applied for it. In the reduction he might have called for production of the decret; and if he then wished to proceed on the irregularity, all he had to do was to ask leave to amend his summons. (*Lord Eldon, C.* He goes on here guessing what it may be, and prays that it may be reduced for reasons set forth, and *other reasons* to be proponed on the discussion. Now this reason, that the decret was against *Anderson and Co.* was not specifically mentioned in the summons. Could that be taken advantage of under the words *other reasons, &c.*?)

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It could not; *Newcastle Fire Company v. McMorran*, where the policy was misdated in the summons. In the *Queensberry* cases, the summons against the Duke of Buccleuch was amended after issue, and they might have amended their summons here so as to lay the ground of irregularity. But they had not done it, and there was no issue after the decret was produced. (*Lord Eldon, C.* What is the meaning of *illegally extorted* in the Lord Ordinary's interlocutor?) The meaning I take to be, that the justices were wrong in point of law, and that the officer had no right to make the seizure; and that the goods having been sold under

Newcastle Fire Company v. McMorran, ante vol. 3. 264.

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this illegal decree, the money paid for them was illegally extorted from the pursuers.

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Judgment.

Lord Eldon (C). This was a proceeding for the reduction, if I may so express it, of a conviction against Anderson and Co. under certain acts of parliament, for carrying on the business of tanning and currying leather at the same time. There were several questions in the case. 1st, Whether this was a valid conviction, as being a conviction, in a criminal proceeding against Anderson *and Co.* 2d, It was objected not only that this was a conviction in a criminal proceeding against Anderson *and Co.* by that description; and that though a description of that kind had been held good in civil proceedings, it was necessary in a criminal proceeding to know with certainty who are or are not convicted; but also that the conviction was bad for various other reasons apparent on the face of it. But the Appellants contended that, supposing they were wrong in all this, the Court of Session had not jurisdiction, however unjust the conviction in itself; and that the provisions of the statutes as to the time within which the action might be brought, and as to the month's previous notice to the officer had not been complied with. I have considered the case with a great deal of attention; and although there are difficulties in it, I am of opinion, upon the whole, that the Court below is in the right, and that there is not reason sufficient to reverse this decision.

Judgment **AFFIRMED.**

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A.

AGENT.

(*Vide* FACTOR.)

A FACTOR who is such in the sense of agent or receiver, is not bound to a strict administration, nor answerable for loss arising from the omission to adopt it. (*Macdowal v. Buchan* (Scotch), 132, 133.)

It seems that when an agent neglects to keep his principal's accounts in such a way that he can immediately, or within a reasonable time, produce them when called upon, if the principal, owing to the delay, brings an action against the agent, although the agent's accounts should, when produced, be found to be correct, he shall not have his costs. (*ib.* 133.)

AGREEMENT.

(*Vide* SPEC. PER.)

AGREEMENT in writing in 1800, between A. and B. for a lease to B. of a farm belonging to A. for three lives generally, no particular lives being named. C. purchases the farm from A. subject to the agreement, and receives rent from B. who occupied the farm under the

agreement till 1808, when B. discontinued the payment of rent, because C. who had not seen the agreement till 1807, then refused to perform it. Bill by B. in 1809, for specific performance, naming the lives of three of the tenant's children, and decreed accordingly in the Court below; and the decree affirmed in the House of Lords, with some variations respecting the performance of previous conditions by the tenant.

Lord Eldon, C. observing—"The estate was purchased subject to the agreement; and the equity of the case is, that the agreement should have been made good at the time of the purchase; and though it is objected that the naming of the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, since lives might then have been named, which might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform; so there seems to have

"been a mutual default. I have said these few words, because I am anxious that this should not be understood as a decision, that under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of the case, taking it out of a general rule, that the decision is founded."

Notwithstanding the alterations made in the decree, as to the conditions to be performed by the tenant, he was allowed 100% costs, the Appellant not having called below for the proper provisions as to these conditions; and the tenant having been considerably harassed with expenses, in the course of the suit, and with actions for use and occupation. (*Kensington (Lord) v. Phillips* (English), 61, 62.)

ARBITRATION.

ARBITER, well known to the parties concerned for his skill in the subject of reference, acting under submissions reciting that the parties had "confidence in him as a fit person," and had "confidence in his judgment" to carry into effect certain improvements upon lands, and apportion the expense among the parties, refuses to communicate the notes of his opinion, or a draft of the award, before it was pronounced to one of the parties applying for such

notes or draft, and refuses to receive proof of alleged material facts laid before him by the same party; he being himself a competent judge of the subject, and chosen for that reason, and having no doubt in his mind; the award was held good, notwithstanding such refusal: for (*per* Lord Eldon, C.) an arbiter is not bound in all cases to receive evidence, whether it will have any effect on his mind or not. But even in the law of Scotland, which attaches so much value to arbitration, a refusal by an arbiter to receive proof, where proof is necessary, may amount to what they would consider as a ground for setting aside an award.

An arbiter has an interest in the subject of reference, and this is well known to the parties before they sign the submission; the award is good notwithstanding the interest.

Five parties agree to refer the direction of certain extensive improvements, and the apportioning of the expense among them to an arbiter, the submission bearing that the award is to be pronounced, "betwixt and the day of," (omitting the usual words, *next to come*) "or between and any further day to which this submission may be prorogated, and which he (the arbiter) is hereby empowered to do at pleasure." Three of the parties sign the submission in March, 1811. The arbiter prorogated the submission

on the 8th November, 1811, and 2d November, 1812. The two other parties signed the submission, one on the 20th March, the other on the 9th April, 1813, and the award was pronounced in May, 1813, when the work was completed. One of the parties who first signed, endeavours to get rid of the award, on the ground that the legal time had expired, the prorogations being ineffectual, because two of the parties had not signed the submission till after the date of the last of them. But held, that as the party had seen the work going on in the interval between 1811 and 1813, without intimating any such objection, he must be considered as having waived it, and should not be permitted to take advantage of it after the completion of the work.

Arbiter in his award goes beyond the limits of the submission: this does not vitiate the whole award, but the excess held *pro non scripto*, and the award good to the extent of the power. (*Johnston v. Cheape* (Scotch), 247, 248, 249, 263, 264, 265.)

B.

BANKRUPTS.

POWERS of the commissioners as to breaking open the outer doors of houses, shops, &c. (*Burdett v. Abbot* (English), 198.)

C.

CHAPTER.

(*Vide DEAN.*)

CONTEMPT.

(*Vide PRIVILEGE.*)

THE Commons' House of Parliament may commit for contempt. (*Burdett v. Abbot* (English), 165.)

The following question being put to the judges—"If the Court of Common Pleas having adjudged an act to be a contempt of Court, had committed for the contempt, under a warrant, stating such adjudication generally, without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of *hab. corp.*; the return setting forth the warrant, stating such adjudication generally, whether in that case the Court of King's Bench would discharge the prisoner because the particular facts and circumstances, out of which the contempt arose, were not set forth in the warrant?"

It was answered in the negative. (*ib.* 199, 200.)

CONTRACT.

CONTRACT for purchase of lands; 100 acres arable, 700 acres pasture; the purchaser's "entry to commence at Whitsunday, 1807,

"and that he is to have right to *"the crop and year 1807,"* and disposition, assigning *"the rent for crop and year, 1807."* The farm at the time of the sale in possession of a tenant at a rent payable one half at Candlemas, the other half at Lammas, in each year. Held that the seller, not the purchaser, was entitled to the rent, payable by the tenant at these two terms in 1807. N.B. The purchaser obtained possession of the grass and houses at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground in that year. (*Sheppard v. Watherston* (Scotch), 278.)

COSTS.

(*Vide* AGENT—WARRANTY—
FRAUD—AGREEMENT—ERROR.

ALTHOUGH material alterations were made in Dom. Proc. in a decree appealed from, but affirmed as to the principal matter; yet, as the Appellant had not called for these alterations below, and as the Respondent had been considerably harassed with actions and expenses, the Appellant was ordered to pay costs. (*Kensington* (Lord) v. *Phillips* (English), 61, 62.)

Where errors are argued in Dom. Proc. not having been argued below, although they may be well worthy of consideration, the house will, because they were not argued below, order the Plaintiff in error

to pay costs, as if they had not been argued at all in Dom. Proc. (*Doran v. O'Reilly* (English), 233, 234.)

D.

DEAN (AND CHAPTER).

UNDER the words of the Charter of incorporation of the Dean and Chapter of the Cathedral church of H. T., Dublin, ordaining that "the Archdeacon, &c. can and "may enjoy a stall in the choir, "and a voice and place in the "Chapter in all Chapter acts, &c;" he has a voice in all its corporate acts, and not merely in the acts of that Chapter considered as the Archbishop's council: and, it seems, he may vote by proxy. (*Kildare v. Smyth* (Irish), 225.)

DEBTOR.

(*Vide* MAGISTRATES—PRISONER.)

UNDER what circumstances a Debtor is entitled to liberation on bill of health. (*Ritchie v. Magistrates of Canongate* (Scotch), 87.)

DECREET.

(*Vide* ARBITRATION—IRREGULARITY.

DEVISE.

DEVISE of freehold estates to J. R. nephew and heir at law of testatrix

for life, and on his decease, "to and
 "amongst his children lawfully be-
 "gotten, equally, at the age of
 "twenty-one, and their heirs as
 "tenants in common: but if only one
 "child shall live to attain such age, to
 "him or her, and his or her heirs, at
 "his or her age of twenty-one years:
 "and in case my said nephew shall
 "die without lawful issue, or such
 "lawful issue shall die before twenty-
 "one," then over. Held by the
 Court of K. B. and judgment
 affirmed in Dom. Proc. that the
 children of J. R. took a vested re-
 mainder. (*Randoll v. Doe* (Eng-
 lish), 202, 203.)

DOORS (BREAKING OPEN).

(*Vide* PRIVILEGE.)

"By the common law, no House
 "may be broke open by the officer
 "of the King at the suit of a
 "common person, otherwise at the
 "suit of the King." *Per* Treby,
 Ch. J. (*Burdett v. Abbot* (Eng-
 lish), 198.)

ELECTION.

THE *set* or constitution of Inver-
 keithing requiring that the mem-
 bers of council should be resident
 burgesses, the clerk, at the elec-
 tion of a delegate for that burgh,
 in 1812, refused to reckon the
 votes of two persons whose names
 had been entered in the minutes,
 as part of the magistrates and
 town council, assembled for the
 purpose of the election, and to

whom the qualifying oath had been
 administered by himself, in con-
 sequence of an objection on ac-
 count of non-residence; the fact
 of non-residence being notorious
 and consistent with the clerk's
 own knowledge; and the rejection
 of these two votes governing the
 return. Complaint under the
 statute 16 Geo. 2. cap. 11. against
 the clerk, and judgment by the
 Court of Session, that he had
 incurred the penalties of that
 statute, on the ground that the
 officer was bound by it to reckon
 the votes of all those whose names
 appeared as members of council
 on the burgh records, beyond
 which he was not entitled to look;
 and that *bond fides* was no defence.
 This judgment reversed by the
 House of Lords for want of aver-
 ment in the complaint that the
 complainer was duly elected dele-
 gate, the statute having given the
 penalties to the person so elected.
 And also for want of sufficient
 evidence of that fact; the town
 books, with names inscribed, the
 best evidence to show that those
 whose votes were rejected were
 members of council, not being
 produced in proof.

The Lord Chancellor observing, that
 in a case so penal as this, it was a
 wholesome principle that distinct
 averment and clear proof should
 be required.

Lord Redesdale observing, that he
 very much doubted whether the
 construction put upon the act by

the Court below was the true construction. (*Black v. Campbell* (Scotch), 23.)

ENTAIL.

ENTAIL, with restrictions upon the heirs and members of tailzie. Held by the House of Lords, affirming a decision of the Court of Session, that the institute was not included in the word *members*, as used in this particular entail; the word appearing to be used in the same sense as the word *heirs*, and the case being therefore within the principle of decision in the Duntreath case. (*Steel v. Steel* (Scotch), 72.)

The ground of decision in the Duntreath case, not now to be shaken, nor to be got rid of by nice, thin, and shadowy distinctions. (*ib.* 84.)

Effect of the statute 1449, cap. 17. with respect to leases granted by heirs of entail. (*Montgomery v. Charteris* (Scotch), 301, 302.)

Fraud on an entail, as contradistinguished from a breach of prohibition. (*ib.* 320, 321.)

Whether the throwing the public burdens on the old reserved rent is a diminution of the rent or rental. (*ib.* 345, 346, 347, 365.)

Effect of the act 10 Geo. 3. cap. 60. as to the granting of leases by heirs of entail. (*ib.* 352, 353, 354, 355, 356.)

Powers of an heir of entail as to the cutting and sale of timber. (*ib.* 358.)

Effect of taking grassum considered, with reference to the prohibition against diminution of the rental. (*ib.* 363, 365, 367.)

Whether the free rent may be reduced without in the sense of the law diminishing the rent. (*ib.* 367, 369.)

Whether an heir of entail may not, in some circumstances, be restricted otherwise than as he is expressly fettered. (*ib.* 369.)

Whether a prohibition against disposing is co-extensive, with a prohibition against alienating. (*ib.* 374, 381.)

Consequences of the doctrine that a prohibition against diminishing the rent applies only to the nominal and not to the net rent. (*ib.* 382.)

ESCAPE.

(*Vide* MAGISTRATES.)

ERROR.

Debt in K. B. and demand made in lawful money of Great Britain, founded upon a judgment of the Supreme Court of Jamaica obtained in an action of assumpsit in that Court for so much Jamaica currency, the declaration in K. B. stating that this amounted to so much in British money. Final judgment by default against the Defendant, and error brought in the Ex. Ch.; and there, the errors not being argued, judgment affirmed, and thereupon error in Dom. Proc. Held that the de-

mand being made in lawful money of Great Britain, and the Defendant below having suffered judgment to go against him by default, he had himself assessed the amount, and that there was no occasion to send the matter to a jury by writ of inquiry.

Count in the declaration for interest for the forbearance of money on request: this is well laid, a promise to pay interest being implied.

Where errors are argued in Dom. Proc. without having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the House will make the plaintiff in error pay the costs of the proceedings there, as if the case had not been argued at all in Dom. Proc. (*Doran v. O'Reilly* (English), 293.)

EVIDENCE.

OBJECTIONS to evidence on the ground of interest and confidential agency. (*Towart v. Sellars* (Scotch), 234, 235.)

F.

FACTOR.

A PERSON employed as a gentleman's general law agent in purchasing lands, making payments, in conveyancing and expediting titles, receives, in behalf of his employer, the rents of a small detached property let to inferior tenants, with-

out any written commission as factor, and under circumstances which showed that it was not expected that he should compel payment of the rents by ultimate diligence, as in the case of a country factor, though he charged factor's fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original employer calls upon the agent for payment of the amount of the rents lost during the time of his management by such insolvency; as he might have compelled payment by incarceration, sequestration, and a roup of effects, but neglected to do so. Held by the House of Lords, affirming a decision of the Court of Session, that, under the particular circumstances of the case, the agent was not liable for the rents so lost.

But the agent having been called upon by his employer for a general account, and not having kept his accounts in such a state that they could be readily produced, and the delay having been the immediate cause of bringing an action for an account, though the sum justly due was less than the sum claimed, and the decision below in favour of the agent was affirmed above, it was so affirmed without costs. (*Macdonald v. Buxton* (Scotch), 127, 128.)

FARM.

(*Vide* CONTRACT.)

FISHING.

(Vide SALMON.)

FRAUD.

K. HOLDING certain premises under a lease made in 1769, for three lives at 300*l.* rent in 1802, obtains from **G.** tenant for life of the premises, with power of leasing at the best rent, then under age, and in embarrassed circumstances, by the offer of immediate payment of a year's rent then due, but by the custom of the country not payable till half a year after, and by a promise to plant on the premises 10,000 trees for the benefit of the landlord, and to make over to him those already planted, a new lease of the lands at the old rent, substituting, instead of two of the old lives, two young lives:—the lease, however, containing nothing about the trees planted, and no covenant to plant the 10,000 trees, but only an agreement endorsed on the lease to plant them. The old lease still retained by **K.** and no trees planted by him; but immediately after execution of the new lease of 1802, he assigns that lease upon trust to secure a provision for a wife whom he then marries; and soon after, by will, secures the provision upon other property, in case the lease should be evicted. — **G.** after he came of age, accepts the rent, and gives receipts for it. **K.** dies. Bill against his son, the widow, and

her trustees, by **G.** and his trustees (the remainder-men not made parties) to have the new lease delivered up to be cancelled, as being fraudulent and void—and the bill dismissed below. But the decree *reversed* by the House of Lords, declaring that the lease, as between the lessor and lessee, was such as ought to be cancelled; but remitting to the Court below to proceed, with respect to relief as against the widow and her trustees, as should be just. (*Knatchbull v. Kysane* (Irish), 389.)

Where circumstances are alleged in a bill which, in legal construction, amount to fraud, the ground of fraud is sufficiently laid, although that term is not applied in the bill to the circumstances. (*ib.* 409.)

B. **F.** and **K.** become co-partners in a joint adventure in land. A third person (**L.**), for whom **K.** is factor, is anxious to purchase a part of the co-partnership land called Hilton, at 19,441*l.* and applies to certain monied relations to furnish him with the means of effecting the purchase. **B.** is aware of the anxiety of **L.** to purchase Hilton, but **K.** does not communicate to **B.** the steps taken by **L.** with that view. **F.** (**K.** concurring) persuades **B.** to agree to offer the lot to **L.** at 19,000*l.* in order to bring him to a decision; and **B.** and **F.** offer it at that price to **K.** who accepts it for himself without any objection made by his co-partners, **B.** how-

ever, understanding the offer and acceptance to be for Lord L. Lord L. does not accept the offer at that time, and K. sells the lot at 19,000*l.* to F. without any communication with B.—F. sells pieces of the lot to M. and Lord L., without any interference by B., and then sells the remainder to Lord L. at a price which makes up for the whole lot the sum of 22,311*l.*, instead of 19,000*l.* B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at 19,000*l.* was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of these profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the Defenders, affirmed above, but without costs.

The Lord Chancellor and Lord Redesdale being of opinion that, although the circumstances might raise a suspicion of unfair dealing, B. by his own conduct in not interfering at all with the sales by F. of pieces of the lot to M. and Lord L. taken in connexion with his conduct at the time of the offer to and acceptance by K. was precluded from the relief which he

prayed. (*Bayne v. Ferguson* (Scotch), 151.)

I.

INSANITY.

IN support of an action brought in 1808 to reduce certain deeds executed by M. between 1782 and 1799, upon the ground of the insanity of M. the granter; parole evidence given that he was quite deranged from 1781 till his death in 1804; the evidence applying to his insanity generally and not to the particular moments when the deeds were executed. This evidence encountered by parole evidence of his general sanity during the same period; and this latter evidence corroborated by notes or receipts written by M. having reference to the contents of the deeds; and showing that he understood their nature and effect; and also by the deeds themselves, which were rational in his circumstances, corroborated also by the circumstances that the deeds were attested by witnesses of unimpeached credit, and that M. had been in 1784 served heir, and infest in the subjects conveyed by the deeds, and had then sold part of the lands, and mortgaged the remainder, &c. these transactions proceeding on the supposition of his sanity, and remaining unchal-

lenged. Held by the House of Lords, reversing the judgment below, that the deeds were good.

The Lord Chancellor observing, that supposing M. to be weak or even insane, if he was sane at the time of executing the deeds, that was sufficient to support them: and that the distance of time between the period of their execution and that at which they were challenged was a material consideration; and, that if the deeds had been bad as titles, they could not have been good as securities.

Lord Redesdale observing, that if deeds were to be reduced on the ground of utter incapacity, they could not stand for any purpose; that in order to discover the truth from conflicting evidence, it is proper to try it by the test of collateral circumstances, the truth of which is unquestionable; and that these circumstances in this case were inconsistent with the evidence of notorious incapacity in M.; and that the attesting witnesses to some of the deeds being dead, it must be taken that they would have sworn to the sanity. (*Towart v. Sellars* (Scotch), 231, 235, 242, 243.)

A man confined in a house for the reception and care of insane persons during a lucid interval, under a sense of his situation, the apprehension of a relapse, and the impression that no time was to be lost, disposes of his property in a

rational manner. The instrument held valid and effectual for its purpose. (*ib.* 236.)

INSURANCE.

A. A MERCHANT in London, having an order in 1810 from B. a merchant in Perth, for goods to be shipped from London for Dundee, sends the goods to the wharf on Saturday 24th Feb. the vessel then taking in goods for Dundee, being the K. (unarmed) which had been substituted by the Shipping Company for the D. (armed), the Company announcing on the 23d and 24th Feb. to all who inquired that the K. and not the D. was to sail on the 25th (Sundays and Thursdays being the regular sailing days). A. dispatches the invoice on 27th Feb. dated on that day, with advice that the goods had been sent by the D. not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March. The K. sails with the goods on the 25th Feb. and is captured on 2d March by a privateer. Action brought by A. against B. for the price of the goods, and held below that he could not recover. The judgment affirmed above, the Lord Chancellor being of opinion that if B. had insured upon the re-

presentation sent him, he could not have recovered from the underwriter. (*Arnot v. Stewart* (Scotch), 274.)

IRREGULARITY.

DECREET in October, 1817, by justices of peace against Anderson and Co. tanners, finding them liable in a penalty, and condemning stock on their premises seized in August or September, 1807, by an excise officer, made without evidence, on complaint of a collector of excise that Anderson and Co. carried on the trade of carriers as well as tanners at the same time, contrary to law. The goods sold under the decret, and purchased up by Anderson and Co. who brought their action in 1809, in the Court of Session, against the excise officers, for reduction of the decret for reasons specified (the decreets being against Anderson and Co. not being one of the reasons specified), and other reasons, and for repetition of their money, and for damages. Preliminary defences founded on want of jurisdiction in the Court, because the decret rested on revenue statutes, on want of a month's previous notice to the officer, and on the alleged expiration of the time for bringing the action (three months), repelled: and interlocutor of the Lord Ordinary on the merits reducing the decret, and finding the

pursuers entitled to repetition of their money, but assoilzieing the defenders from the conclusion for damages. The interlocutor acquiesced in by the pursuers, who dropped their claim for damages, and the interlocutor adhered to by the Court. Difficulties in the Dom. Proc. because the summons contained a conclusion for damages, though not insisted upon after the Lord Ordinary's interlocutor; and because the reason that the decret was against Anderson and Co. was not specified in the summons, and question whether it could be taken advantage of under the words "other reasons:" but the judgment **AFFIRMED**. (*Campbell v. Anderson* (Scotch), 412.)

JURISDICTION.

(*Vide* IRREGULARITY.)

JURISDICTION of the Court of Session as to revenue matters; reducing decreets of magistrates for irregularity, &c. (*Campbell v. Anderson* (Scotch), 412.)

L.

LANDLORD.

LEASE in 1713 for three lives, renewable for ever on payment of a fine on the dropping of each life, at 50*l.* rent, by A. to B. B. leases the lands to C. at 100*l.* rent, with covenant to renew for ever to C. on the same terms; and B. also

covenants to renew regularly with A. C. pays his fines and renews with B. but B. never renews with A. A representative of A. in 1793, accepts some money from C. towards the discharge of the fines due from B. and makes demands for payment of the whole of the fines by C. which C. neglects to comply with. A formal demand of the fines made by a representative of A. in 1799, against C. who does nothing for nine months after demand, and then makes an illusory tender which is not accepted. Held, by the House of Lords, that under these circumstances C. had no claim in equity to a renewal.

Per Lord Redesdale. A formal demand is not necessary under the tenantry act. The true meaning of the tenantry act is to declare what was the equity of Ireland, with respect to these leases, before the statute. When a demand is made, the neglect to pay, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect and becomes wilful. What is a reasonable time for payment must depend on circumstances; and no precise time applicable to all cases can, with justice, be fixed. Though a formal demand is not necessary, yet, when such a demand is made, the prior demands are waived, and the time is to be computed from the period of the formal demand: but prior demands are to be taken into ac-

count in considering what is a reasonable time after the formal demand. When the first lessee receives the fines from his under-tenant, and neglects to pay them to the head landlord, that is fraud in the first lessee, who is therefore not entitled to a renewal, and the remedy of the under-tenant is against the first lessee, and not against the head landlord. The landlord, in making the demand, is not bound to state the precise sum due, nor to make a demand upon, or give notice to, every individual interested in the subject. The original design of these leases, was the better cultivation of inferior lands, and the more easy recovery of the rent, &c. (*Barrett v. Burke* (Irish), 1.)

LEASE.

AGREEMENT for a lease for three lives generally, and no lives named for some years, but the lessor acting as if he considered himself bound by the agreement. The agreement specifically performed under the circumstances, the lives being named by the lessee. (*Kensington (Lord) v. Phillips* (English), 61.

M.

MAGISTRATES.

THE magistrates of Canongate, upon

a certificate on oath by a physician, that the life of a debtor, confined in their gaol by the Appellant, was in imminent danger, permitted his liberation from the gaol to some house within the burgh, on his giving bonds with two sureties to conform to the conditions of the Act of Sederunt, 1671, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same, and returning to prison on recovery of his health, or when required, under penalty of paying the debt. A particular house within the burgh was assigned for the residence of the debtor; but he never was there, and was frequently seen at his house in Surgeons' Square and other places without the burgh, apparently in good health. The Appellant commenced an action against the magistrates for the debt, on the ground that the debtor's residing out of the jurisdiction of the burgh of Canongate was an escape, which made the magistrates liable. The Court below decided in favour of the magistrates; and this decision was affirmed in the House of Lords, both on the general ground that the circumstances were not such as rendered the magistrates liable under the Act of Sederunt, and also upon certain specialties in this case.

The Lord Chancellor stating, that he would have had some difficulty

in saying that the magistrates were not liable on the general ground, if the construction, as to this point, to be put on the act, had not been, in some measure, settled by the decisions in the cases of *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen* in 1793. (*Ritchie v. Magistrates of Canongate* (Scotch), 87, 88, 123.)

MISREPRESENTATION.

(*Vide* INSURANCE—WARRANTY.)

WHERE a horse was sold under warranty of soundness, &c. but with a misrepresentation as to the place from which he was brought, observed by Lord Eldon, C. that if the horse answered the warranty at the time of the sale, the misrepresentation as to the place from which he came would not invalidate the contract. (*Geddes v. Pennington* (Scotch), 164.)

N.

NEGLECT.

(*Vide* LANDLORD—TENANT.)

THE Irish tenantry act is merely declaratory of what was the equity of Ireland, with respect to leases for lives renewable for ever, in cases of mere neglect to renew,

before that act. (*Barrett v. Burke* (Irish), 15.)

And the moment a demand is made, neglect to pay when it goes beyond a reasonable time is wilful, and a reasonable time is such time as may be necessary to enable the tenant to ascertain when the *cestui que vies* died, to compute the sum due, and to prepare the leases for execution. What is a reasonable time must therefore depend on the circumstances of each case, and no precise time can properly be fixed. (*ib.* 16.)

NETS.

(*Vide* SALMON.)

O.

OFFICERS (RETURNING).

(*Vide* ELECTION.)

WHETHER the acts subjecting returning officers to the penalties appointed by the statute 16 Geo. 2. cap. 11. must not be acts done in breach of the oath prescribed by that statute, and such as would render the officers liable to a conviction for perjury, that is, that they should be acts done wilfully and falsely, or *malâ fide*. (*Black v. Campbell* (Scotch), 59, 60.)

OFFICER (EXCISE).

(*Vide* IRREGULARITY.)

P.

PARLIAMENT.

(*Vide* PRIVILEGE.)

THE Commons' House of Parliament has the power to commit for contempt. (*Burdett v. Abbott* (English), 165, 200.)

PARTIES.

WHERE a lease made by tenant for life, with a power to lease, was invalid at law as against the remainder-men, as being a bad execution of the power, held that the remainder-men were not necessary parties to a bill by the tenant for life to set aside the lease for fraud. (*Knatchbull v. Kissane* (Irish), 391, 401.)

PERFORMANCE.

(*Vide* AGREEMENT.)

AGREEMENT for a lease for three lives generally, the lives not being named for several years, specifically performed under the circumstances, the lessee naming the lives. (*Kensington (Lord) v. Phillips*, (English), 61.)

PLEADING.

(*Vide* ELECTION.)

IN an action against an excise officer to recover money extorted from a party, by reason of an illegal seizure, summons contains a conclusion for damages, and this, by statute, rendered a month's pre-

vious notice to the officer necessary, which notice was not given. Lord Ordinary decides for the pursuer as to repetition of the money, but assails the defender as to the conclusion for damages, and the pursuer acquiesces: whether this is sufficient to put the summons on the same footing as if it had never contained the conclusion for damages, and to render the notice unnecessary. (*Campbell v. Anderson* (Scotch), 412, 428.)

Decreet by Magistrates against Anderson and Co. condemning their goods seized by an excise officer, and finding them liable in a penalty. In an action to reduce the decret for reasons specified and other reasons, whether the objection that the conviction was bad as being against A. and Co. by that description, that not being one of the reasons specified, could be taken advantage of under the words, *other reasons*. (*ib.* 427, 428.)

PRACTICE.

(*Vide* ERROR.)

APPEAL from a judgment in declarator in 1810, suffered to drop, and action of reduction brought in 1812, to reduce the judgment in the declarator; and in 1813 one appeal presented from the judgments in both causes, and the general answer put in. Objected, when the appeal came to be heard in 1817, that it was irregular to

join both causes in one appeal; and, besides, that the appeal was irregular as to the declarator, the petition not having been presented within the first fourteen days of the session. The House was of opinion that there was an irregularity in the mode of bringing the causes before it; but:—1. The objection ought to have been made in 1813, when the other parties might have put themselves right in point of form:—2. It ought to have been made by petition, to be referred to the appeal committee:—3. When a cause comes on to be heard, it is to be taken as regular: and, therefore, the appeal heard on the merits, and leave given to the parties afterwards to set themselves right in point of form by presenting another petition of appeal in the declarator *nunc pro tunc*, as if it had been done in 1813. (*Dixon v. Graham* (Scotch), 266, 271, 272.)

Though in a bill of exceptions to the directions of the Judge below, the evidence given at the trial upon which the allegation of error depended was not set out at length, but parts of it, consisting of charters, entries, &c. were merely referred to, and the record appeared, on the transcript brought up, to be so far defective; and though in strictness the House of Lords cannot proceed upon such a record, yet upon consent of the counsel for both parties to select such parts as they meant to rely upon, the

cause was heard and decided: the Lord Chancellor stating that a special entry should be made on the journals to guard against the mischief of such a precedent.

(N. B. The evidence was printed in an appendix to one of the cases.) (*Kildare (Bishop of) v. Smyth* (Irish), 225, 229.)

PRISONER.

(*Vide* MAGISTRATES.)

PRISONER for debt in Canongate gaol liberated on certificate, not on oath, of a physician and surgeon, stating that "for preservation of his life he needed free air in a situation where proper care and medicines might be administered," suffered to choose his own lodgings in the burgh, and to visit different places in the neighbourhood beyond the jurisdiction, without any attention paid to his conduct by the magistrates, to whom no application was made by the incarcerating creditors for his reincarceration. Held that the magistrates were not liable for the debt. (*Ritchie v. Magistrates of, &c.* (Scotch), 102, 106, 107.)

Prisoner for debt liberated on bill of health from Aberdeen gaol, and suffered to employ himself in his ordinary affairs, and to go to markets, &c. at a considerable distance from the burgh without restraint. Held that the magistrates were not liable for the debt. (*ib.* 107, 108.)

Practice of the burghs in case of liberation of debtors on account of sickness. (*ib.* 104.)

PRIVILEGE (OF PARLIAMENT).

To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the Plaintiff (the outer door being shut and fastened), and arresting him there, and taking him to the Tower of London, and imprisoning him there: it is a legal justification to plead that a Parliament was held which was sitting during the period of the trespasses complained of: that the Plaintiff was a member of the House of Commons: and that the House having resolved, "that a certain letter, &c. in Cobbett's Weekly Register, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House, and that the Plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered that, for his said offence, he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the Defendant as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the

execution of such warrant belonged, to arrest the Plaintiff, and to commit him to the custody of the Lieutenant of the Tower: and issued another warrant to the Lieutenant of the Tower to receive and detain the Plaintiff in custody during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the Plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose and demand made of admission, he, by the assistance of the said soldiers, broke and entered the Plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in the custody under the other warrant by the Lieutenant of the Tower.

And to a similar action against the Serjeant at Arms, a similar plea, with variations, however, adapted to his situation, is a legal justification.—(*Vide* 14 East. 163.)

The Lord Chancellor considering it as clear in law that the House of Commons have the power of committing for contempt, and that this was a commitment for contempt. (Lord Erskine concurring.) *Burdett v. Abbot* (English), 165.)

PUBLICATION.

If I send a manuscript to the printer of a periodical publication, and do not restrain the printing and pub-

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lishing of it, and he does print and publish it in that publication, then I am the publisher. *Per* Lord Erskine. (*Burdett v. Abbot* (English), 201.)

R.

REVENUE.

(*Vide* IRRREGULARITY.)

WHETHER the act 1 Jac. 1. cap. 22. for regulating the trades of tanners and curriers is a revenue statute. (*Campbell v. Anderson* (Scotch), 412.)

S.

SALE.

(*Vide* CONTRACT.)

SALMON (FISHING.)

DESCRIPTION of the stake net apparatus for salmon fishing. (*Dalglish v. Duke of Athol* (Scotch) 282.)

Salmon fishing with stake nets held to be illegal. (*ib.* 291.)

T.

TENANT.

(*Vide* LANDLORD.)

A FORMAL demand for payment of rent and renewal fines, not ne-

cessary under the tenantry act: but when such a demand is made the time is to be computed from the period of that demand; the effect of prior demands being waived by the subsequent formal demand if the rent and fines are paid in a reasonable time after that demand. But prior demands are to be taken into account in considering what is a reasonable time after a formal demand. (*Barrett v. Burke* (Irish), 27.)

The intermediate tenant receives the fines from his under tenant, and does not pay them to the head landlord. This is fraud in the intermediate tenant, and destroys his right to a renewal. (*ib.* 18.)

The landlord in making the demand is not bound to state the precise sum due: the tenant is bound to ascertain and tender the sum: a simple demand is all that is necessary on the part of the landlord. (*ib.* 19.)

Where the interest is divided by under leases, it is not in every such case necessary that the demand by the head landlord should be made upon all the individuals interested in the subject, as it may be impossible for him to discover them all. (*ib.* 20.)

The meaning and benefit of the tenantry act are confined to cases of mere neglect. (*ib.*)

The original design of the Irish tenure by leases for lives renewable for ever, was to promote the cultivation of inferior lands, to

preserve the landlord's property, and to enable him to recover the rent, the tenure being important for these purposes in the disturbed state of Ireland. (*ib.* 22.)

V.

VOTE.

(*Vide* ELECTION.)

W.

WARRANTY.

G. PURCHASES from P. a horse-dealer, a horse warranted "a thorough-broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold by a gentleman from England. For about two months from the time of the purchase G. himself has no opportunity to drive the horse in a gig, but during that interval the horse is often driven in a gig by others, and performs well. Then G. himself, on two occasions, drives the horse in a gig, on both of which occasions the horse performs ill, kicking out behind, and running forcibly to the side of the road, and at one time overturning the gig in a ditch. P. refusing to take back the horse, G. brings his action for the price and damages. It appeared in evidence that P. had got the horse from a Mr. A. of Leith,

who parted with him on account of his having, on one occasion, when driven in a gig, without any apparent cause, kicked out violently behind and broke the gig. But it was also proved that the horse, while in the possession of A. of P. and of G. himself, as above-mentioned, had been very often driven in a gig, and on these occasions found steady and safe. It was in evidence likewise that G. had whipped the horse and checked him at the same time, on the occasion when his gig was overturned. No other evidence was given as to G.'s experience or skill in driving. Judgment below for P. the horse-dealer, a majority of the Judges being of

opinion upon this evidence that the horse did answer the warranty at the time he was sold, and that his bad demeanor in the hands of G. was owing to want of skill in the driver; and, the Lord Chancellor being of that opinion, the Judgment was affirmed above, but without costs.

The Lord Chancellor observing, that, if the horse answered the warranty at the time he was sold, the misrepresentation as to the place from which he came would not invalidate the sale; but that it was a material circumstance with respect to the question of costs. (*Geddes v. Pennington* (Scotch), 159, 164.)

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